

DEFINING THE FUTURE OF CAMPAIGN FINANCE  
IN AN AGE OF SUPREME COURT ACTIVISM

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HEARING  
BEFORE THE  
COMMITTEE ON HOUSE  
ADMINISTRATION  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED ELEVENTH CONGRESS  
SECOND SESSION

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Held in Washington, DC, February 3, 2010

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Printed for the use of the Committee on House Administration



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U.S. GOVERNMENT PRINTING OFFICE

55-410

WASHINGTON : 2010

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## DEFINING THE FUTURE OF CAMPAIGN FINANCE IN AN AGE OF SUPREME COURT ACTIVISM

WEDNESDAY, FEBRUARY 3, 2010

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON HOUSE ADMINISTRATION,  
*Washington, DC.*

The committee met, pursuant to call, at 1:53 p.m., in Room 1310, Longworth House Office Building, Hon. Robert A. Brady [chairman of the committee] presiding.

Present: Representatives Brady, Lofgren, Davis of California, Davis of Alabama, Lungren, McCarthy, and Harper.

Staff Present: Jamie Fleet, Staff Director; Tom Hicks, Senior Elections Counsel; Janelle Hu, Elections Counsel; Jennifer Daehn, Elections Counsel; Matt Pinkus, Professional Staff/Parliamentarian; Kyle Anderson, Press Director; Joe Wallace, Legislative Clerk; Daniel Favarulo, Legislative Assistant, Elections; Darrell O'Connor, Professional Staff; Shervan Sebastian, Staff Assistant; Peter Schalestock, Minority Counsel; Karin Moore, Minority Legislative Counsel; Salley Collins, Minority Press Secretary; and Mary Sue Englund, Minority Professional Staff.

The CHAIRMAN. Good afternoon, everybody. The Committee on House Administration hearing on Defining the Future of Campaign Finance in an Age of Supreme Court Activism will come to order.

In his State of the Union speech in 1905, Republican President Teddy Roosevelt said, "All contributions by corporations to any political committee for any political purpose should be forbidden by law." On January 21, 2010, in a single sweeping opinion, the conservative majority of the Supreme Court threw out nearly 100 years of laws and destroyed decades of commonsense legislation and regulations designed to adhere to that basic principle.

Imagine Wall Street bankers creating political campaigns to target Members as we debated the TARP plan. Does anyone think that giving the Gordon Gekkos of the world access to corporate funds to wage political campaigns will make our democracy any stronger? I doubt it. Imagine foreign investors waging political campaigns during the negotiation of American trade policy.

I am hopeful that we will be able to reach across party lines to ensure that, at a minimum, corporations, particularly those that are foreign controlled, cannot exert undue influence on American elections. Strengthening disclosure requirements, protecting the interests of shareholders, and safeguarding against foreign influence are three areas where we can start.

Many Members of Congress have already acted, including Mr. Capuano, a member of our committee, who introduced the Shareholder Protection Act. Mr. Capuano's bill requires corporate CEOs to disclose to their investors or shareholders how corporate treasury funds are being spent to influence elections.

In his State of the Union Address last week, President Obama said that the Supreme Court decision will open the floodgates for special interests, including foreign corporations, to spend without limits in our elections. At least one jurist seems to believe that this is simply not true. I say today to Justice Alito, prove it; prove that Citizens United will not lead to an election system that is, in the words of the President, "bankrolled by America's most powerful interests, or worse, by foreign entities".

Today we begin the process. This is the committee of jurisdiction over Federal elections. So, make no mistake, any law or legislation that defines Federal elections in the wake of Citizens United will be considered by this committee. This is our responsibility, and we intend to meet it. To this end, this committee will conduct hearings that will allow for a full airing of all viewpoints.

We understand that in the intersection of free speech and fragile election law, opinions diverge and passions flair. This hearing will therefore not be constrained by a 5-minute rule. Members will be given an opportunity to fully air out their concerns, but the committee will not, in its relaxation of the rules, let it get so relaxed. We respect all opinions, but we are also aware that at the end of the day our constituents expect us to act.

I would now like to recognize my friend from California, Mr. Lungren, for an opening statement.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

We have worked on a bipartisan basis through this Congress. I knew there would be a point in time when we might reach more contentious issues, and I think that point has been reached.

The CHAIRMAN. But we are going to do it with a smile on our face.

Mr. LUNGREN. We shall. We shall.

I might just start out by saying the first amendment is an inconvenient truth. The Constitution is a series of inconvenient truths. They have within them various principles articulated that establish the relationship of individuals to the Federal Government, and sometimes they do not allow us to do things we might feel we want to do. But the test of time has reached a conclusion that, by and large, we were served well with it.

This hearing comes amidst a flurry of bills introduced in response to the Supreme Court's recent decision in Citizens United v. Federal Election Commission. We still await a promised legislative proposal from the chairman of the committee charged with electing Democrats to the House and the former chairman of the Senate counterpart. In the meantime, let us consider some of the fundamental issues at stake.

The first amendment states very simply, "Congress shall make no law abridging the freedom of speech." Let me say that again. "Congress shall make no law abridging the freedom of speech."

Mr. Chairman, we know that historically the most sacred kind of speech for the Founders was political speech; and even though

the Supreme Court for decades, in my opinion, has spent a lot more time dealing with questions of nude dancing and other kinds of issues that probably never were contemplated by our Founding Fathers, the essential part is, as Justice Kennedy said in his majority opinion, “The essence of the protected speech in the first amendment is political speech,” and that ought to be our focus.

Our government was not organized to quash dissent, minority views, or respected interests of various kinds, but, rather, to make those interests compete against one another in the court of public opinion. And frankly, it was not just to compete but to compete robustly, to have the clash of ideas presented as the way that we would best come to conclusions as to how we would order ourselves under the Constitution, not say there will be disfavored speech or disfavored individuals or disfavored groups.

To attempt to root out free speech and to ration the arguments and voices of persons and entities within this country by controlling the timing, the manner, the character, and mechanisms of political speech defies our tradition rather than defines it, defies our Constitution, defies our system of ordered liberty, and I would argue it defies common sense. It is, in my judgment, judicial activism to read words into the Constitution that do not exist or to ignore words that are there. Taking the words of the Constitution at face value is not judicial activism, it is giving effect to the words or the work of our Founders.

It is this long-held and long-revered truth that the Court, in my judgment, affirmed in the decision in *Citizens United*. Far from being the undoing of our system of free and fair elections—dangerous hyperbole that I have heard from a number of this decision’s critics—this decision was the affirmation of one of the first principles of our democracy, that as Madison wrote during the height of the debate surrounding the Alien and Sedition Acts, the “right of freely examining public characters and measures and of communication is the only effectual guardian of every other right.”

What I find most troubling in the midst of this debate is the penchant or an apparent indifference by some to speech rationing and speech restrictions. As far back as 1976, the Supreme Court has worried that limits on political spending allow the government to restrict the speech of some elements of our society in order to enhance the relative choice of others. Mr. Chairman, I believe the government should never be in the position of deciding what voices are worthy of being heard.

I hear many say, well, the answer to all of our problems is more restrictions under campaign finance reform. I happen to remember as a student in college that there was somebody called Clean Gene. His name was Gene McCarthy. He rallied the young people of America in an effort to deal with the question of an unpopular war.

President Lyndon Johnson was President of the United States. Most people expected that he would basically sail to victory in the next election, but Gene McCarthy began the “children’s crusade” against him. Interestingly enough, Eugene McCarthy was backed by five multimillionaires to provide the essence of his ability to speak. Stewart Mott gave him a huge amount of money. Today, Mr. Mott would go to prison for giving that amount of money to any

individual. And yet it was Eugene McCarthy who brought down Lyndon Johnson.

I remember studying at the library at the University of Notre Dame when all of a sudden I heard students running, running through the floors yelling at the top of their lungs. And what they were running about is that President Johnson had just announced he was not going to stand for reelection.

Now, Eugene McCarthy was not the nominee. His position was later taken essentially by Robert Kennedy; and, unfortunately, we had the tragedy of the assassination of Robert Kennedy in southern California. But the fact of the matter is the unseating of a President, who was leading us at that time in an unpopular war, was effectuated by a lone voice in the United States Senate who was allowed to multiply his impact because he was assisted by funding from a number of individuals.

Now, some people interpret that history differently than I do, but I have always been struck by the irony of that. Eugene McCarthy could not become the candidate he was in 1968 today because he wouldn't have that voice.

During the oral arguments in this case that we are talking about here today, the Deputy Solicitor General went so far as to suggest that laws passed by Congress would allow the government to ban books. I happen to think that is essentially when the Supreme Court began to realize what they had in front of them. When the Deputy Solicitor General said, yes, if you had this book put out by a corporation, 500 pages, and at the end it said vote for or against someone, would the government be able to ban that book? And the answer was yes. Have we gone so far that we believe that banning books are allowed under the first amendment?

As Justice Kennedy powerfully wrote, "When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought."

Mr. Chairman, many say they want to stop corruption and the appearance of corruption. I, too, support these worthy goals. But quashing political speech is not the way to accomplish that. That is, frankly, in the opposite direction of where the Constitution directs us. The most effective way is to have more information, more openness, more transparency, and more accountability in the way we do the people's business here in the U.S. Congress.

"Congress shall make no law abridging the freedom of speech." Mr. Chairman, I hope that, whatever we do, we will not abridge that freedom. Let's not be tempted with abridging that freedom. Let's make no law abridging, constricting, or shrinking political speech and the societal spaces in which it thrives. Let us instead support, strengthen, and encourage speech, that very same freedom we are using here today in these important deliberations.

And so, Mr. Chairman, I would say I look forward to hearing from our panel of witnesses. I think you have given us an array of distinguished witnesses, and I think we are going to engage in some healthy debate under the concept of free political speech.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Ms. Lofgren.



Ms. LOFGREN. Thank you, Mr. Chairman.

I think you are right. We don't see this eye to eye. I will say that, in reading the majority opinion in the Citizens United case, I was really shocked by the lack of judicial restraint and the departure from stare decisis, really just defining that, since we don't agree, would ditch the precedent. It is really not something you usually see in reading Supreme Court decisions, and it is really a case of very strident activism, I think.

I am concerned about the impact on free elections. I was interested that a former Justice, Sandra Day O'Connor, who recently, I just think yesterday, indicated that she is concerned that corporate money will influence not only the outcome of legislative and executive races throughout the country but has expressed concern that the rush of corporate money will be problematic—and this is a quote—“for maintaining an independent judiciary”. And certainly that is of concern.

I would note that the first amendment really is first because it is probably the most important, and yet we do sometimes regulate speech. For example, we prohibit Federal employees from doing certain political activities because of the concern that the mixing of Federal employment and the political spectrum might taint both services. We prohibit illegal aliens from contributing to political campaigns; and no one has said, well, what about their free speech rights if they are here? The remedy to the free speech of illegal aliens would be the speech of legal residents or U.S. citizens. So it is simply not correct to say that we never regulate in the area of speech.

I think it is important to note that when the Founders formed this great union, the idea of corporate speech was really quite foreign to what they were thinking of when they wrote the Constitution.

But, having said all of that, I recognize that we have a Court decision. I may agree with Justice Stevens' dissent a lot more than I do with the majority opinion, but that really is not what is before us. We have the Court's decision. There is no appeal from the Court's decision. And so I read the decision looking at what can be done, given the new legal realities that we face?

It seems to me that the Court really did invite certain things. They embrace disclosure as a remedy to whatever problems might be attendant to the majority decision, and so I think we need to take a look at our disclosure laws and make sure that they are really up to date.

The Court spoke with great favor on the Internet and the ability to instantly let everyone know who was saying what, and I think that bears examination.

There was more than one reference to the role of corporate democracy and what remedy shareholders might have if they were concerned about the speech of a corporation. And, actually, let's be honest, corporations are people only as a fiction. It is really the shareholders who own it, and yet the shareholders don't have a say in what is happening. So I think we need to think through how do we provide mechanisms for shareholders to be fairly dealt with? And I am hoping that the witnesses will accommodate that.

Corporations are entirely creatures of law, and so I think we need to think through what of the various elements that we grant to corporations are important relative to this new freedom that they have in political advertising. I mean, it is worth noting that if you added up all that was spent on congressional elections in the last cycle—and this is information that I got off the FEC—the average amount for winning a House seat in the 2008 cycle was \$1.4 million. During that same cycle, ExxonMobil had \$80 billion in profits that same cycle. So if ExxonMobil used just 1 percent of their profits on political activity, it would be more than all the 435 winning congressional candidates spent to win their races. I mean, the scale of what one corporation could do versus what every candidate could do is pretty stunning.

So I think we need to take a look at those tax issues, corporate law issues. And I also hope that we can take a look at a bill that our colleague, John Larson, has introduced that would allow an opting out of this whole situation, where, on a voluntary basis, you could have public funding of campaigns. That is not going to be the only answer to this situation, but I think it is time to throw that whole concept into the mix of this discussion, and I hope some of the witnesses can discuss that as well.

I want to thank you, Mr. Chairman, for holding this hearing. I think it is extremely important that we pay attention to what the Court has wrought and that we avail ourselves of the invitation the Court had in its decision to remedy whatever holes have been created from the new law.

With that, I yield back.

The CHAIRMAN. I thank the lady.

Mr. McCarthy.

Mr. MCCARTHY. Thank you, Mr. Chairman.

I am actually very eager to hear from the witnesses today. As you know, the room is actually packed, and it is nice to see.

One thing I would say, in listening to the opening statements, as my colleague from California also brought up, public financing, I hope we care as much about the taxpayer who would be that shareholder as we conveyed from the other side of how much input the shareholder would have from corporations.

In reading what the Supreme Court wrote, it talked more also than just corporations. It talked about free speech. But it also talked about the idea I hope comes out within here that we are able to hear about, what about those members of unions that don't have the say? A shareholder can even sell the stock. A union individual would have to quit their job if they didn't like the way the money was spent. So I hope we get a very fair treatment to all taxpayers and to all citizens out there and we keep the First Amendment in the process as we go through and we actually find common sense.

When you go out and listen to Americans today and they see what transpires in back rooms that has been happening with different bills through here, they are frustrated. I like the idea of what the Supreme Court said about transparency. I like the idea that everybody can see what is happening on the table, that the American public, I always trust them, as long as they have the op-

portunity to see what is all being done and let them make the judgment at the end of the day.

So I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Mr. Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman.

Mr. Chairman, generally, I don't do comments in the beginning, but I feel today it is important that we do.

Though I respect some of the comments that were made, I thought I was listening to Justice Douglas about freedom of speech. And I just wish that if that is the only thing you will agree with him on, that is wonderful, but I would hope that you would agree with Justice Douglas in everything else he ever wrote as well, a fine, wonderful Justice.

At the same time, we have always had some limitation on freedom of speech, and I would suggest that what we are doing now—what I am doing now—is trying to search for a way that is a reasonable, thoughtful, legal, constitutional way to do that. And I understand fully well that that is what we do here. We try to find ways to do what we are trying to accomplish without breaching the Constitution. And if the Court has said that—in a 5–4 decision, if I remember correctly—so be it. So I think, for me, I am searching for other ways to give the American people what I think they really want, which is an unfettered opportunity to make their own decisions on a level playing field.

And I would argue that this is only one aspect of it. I think we need to talk about other things. I like some of the transparencies. I would love to get rid of the 527s, and I invite anybody to work with me to do that. If we can't get rid of them because, again, they might be free speech things, for me, I have no problem with an ad going up saying, Mike Capuano is Terrible, brought to you by the Exxon Corporation—let my voters know who is bringing it—as opposed to, Mike Capuano is Terrible, brought to you by Americans for a Better World, funded by the Exxon Corporation.

I think those are the things we need to talk about, and those are things we need to work on. And I look forward to doing so over the next couple of months with people who are serious about this.

I will tell you that this campaign finance bill that we passed a couple of years ago, I was never thrilled with a lot of these things. We talked a good game. But one of the worst things we did was increase the amount of money that individuals can give. I don't know, maybe I am the only person here who has a hard time finding many people who can donate \$2,400 at a clip. And that is only part of the game because it is really \$4,800, we all know that, and if they have a spouse, it is really \$9,600. Now, I have some constituents who can do that, and some do, but I hate asking people for \$10,000. And I would argue that we should be looking at ways to get rid of that as well.

I know that that is a little bit beyond today's scheme, but really what I think today is talking about is trying to find a way to get the election system back in the hands of the average voter so they can make a thoughtful, level-playing-field decision, not just on me but on all of us and on issues.

So I am going to try my best to avoid—which is going to be hard to do, of course—to avoid some of the high-flying commentary about freedom of speech and everything else. And I actually agree with Mr. McCarthy's comment about unions. I am looking for ways to get union members to have a say in that manner. I think that is a fair commentary, and I would love to work with you or anybody else to try to do so.

I am not trying to stop people from being involved. Corporations were always involved. The question is, to what degree? And the same thing with unions or anybody else. What I would love to do is get everybody out of it, go to public financing and let that decide it, let the taxpayers who have to rely on us pay for it. I know that is probably beyond the scope of what we can do, but that is the best way to get rid of everybody, get out of this business, and let the voters have an equal say on everything.

Nonetheless, I actually look forward, and I hope that we can get beyond some of the political rhetoric of all of us—we all engage in it, me, too—to get to a point where we can actually maybe try to work on trying to find some ways to make this work.

And, again, I understand if somebody thinks, forget it, just total free speech, everybody can do whatever they want with as much money as they want. I respect that opinion. I don't agree with it, but I respect it. I think it is reasonable one, a thoughtful one, but just say it. If that is what you want, a free for all, anybody with the money can put as much money as they want on the table, fine, but then don't pretend that somehow you want to level the playing field. It is not a level playing field.

That is what I am looking for, is reasonable, thoughtful ways to do it in reaction to a Supreme Court decision, which I disagree with, but it is not the first Court decision I have disagreed with and it won't be the last, regardless of how the Court is made up. And to try to find ways to do so legally, thoughtfully, with transparency, that hopefully we can all find a way to work together. I don't know that we can; and, if we can't, I will be happy to do my best to then defeat those people who don't agree with me. But that is what the system is all about.

I hope that none of us have to hang a sign underneath our nameplates, Brought to You by Exxon. I won't be hanging that particular nameplate, because I don't think they would probably be donating a whole lot to me, but I do expect that maybe I will be brought to you in spite of Exxon.

With that, Mr. Chairman, I yield back.

THE CHAIRMAN. I would like to thank the gentleman and clear the record: Mr. Capuano is not a terrible guy.

Mr. Harper.

Mr. HARPER. Thank you, Mr. Chairman.

So far, the discussion of Citizens United has been filled with much rhetoric about catastrophe. There have been dire warnings about foreigners taking over our elections and corporations flooding our airways with political advertisements. What there has been relatively little discussion of or adherence to are actual facts. That is what I hope we will hear from our witnesses today and what I would like to talk about for a few minutes.

First, let's dispense with the oft-used talking points that Citizens United changed a century of American law. The law that is a century old bars corporations and unions from contributing to candidates out of their general funds. That law still exists in full force today, and Citizens United did nothing to change that or disturb that.

Next, let's suspend with the talking points that the Citizens United decision will allow foreign corporations to spend without limit in our elections and that American elections will be bankrolled by America's most powerful interests or, worse, by foreign entities. Existing statutes and regulations, undisturbed by Citizens United, address this.

As we sit here today, it is illegal for any foreign national to directly or indirectly make contributions or expenditures in any American election or to direct the decisions of any corporation or union's election-related activities.

We have also heard talk about banning entities that employ lobbyists from making political expenditures. That seems to be saying that if you exercise your first amendment right to petition the government for a redress of grievances, then you must sacrifice your first amendment right to speak on political issues.

We have heard that some corporations are so close to the government or look so much like the government that they should be treated like they are the government and not allowed to speak. Do not mistake the breathtaking scope of this claim. The examples cited include Wal-Mart and health insurers. And, of course, we have heard that the way to solve all of these problems is to use taxpayer funds to pay for congressional campaigns.

All of these points lead in one direction, toward the government deciding who can speak, who can't speak, and how much they can speak. That is exactly the position our Founders rejected when crafting the first amendment, and it is exactly the position the Supreme Court rejected in Citizens United.

Another claim that we hear often these days is that Citizens United was an exercise in judicial activism. Ignoring words in the Constitution is judicial activism. Reading words into the Constitution that aren't there is judicial activism. It is not judicial activism to decide that a law banning speech is invalid in the face of constitutional language that "Congress shall make no law restricting the freedom of speech."

It is obvious that many individuals, especially on the Democratic side, disagree with the Supreme Court's decision, but to resort to misleading and overblown rhetoric does force us to wonder how much of the response is based on a policy disagreement and how much is based on a desire to manipulate the rules to benefit their own candidates. For example, they do not seem concerned about the ability of labor unions to spend freely to support or oppose candidates or show any interest in subjecting unions to the same kind of restrictions they would place on corporations.

As we move toward considering legislation, I encourage this committee to take great care that its work is not designed to benefit either political party over the other.

Thank you, and I reserve the balance of my time, Mr. Chairman.  
The CHAIRMAN. I thank the gentleman.

Mrs. Davis.

Mrs. DAVIS of California. Thank you, Mr. Chairman. I really came to hear the panel. I appreciate you all being here. I didn't realize my colleagues were reading speeches today. There are a few things I just wanted to mention then, since it looks like I am going to have to go lead my own subcommittee a little before 3 o'clock.

I think the basic questions really are, where are the voters in this? I think what we always want to do is encourage involvement and not turn people away nor create apathy. So I think that is an issue that we want to think about as we do this and how we continue to engage them.

The other issues, of course, are around disclaimers, which people have mentioned. What is the most efficient way that one can have a disclaimer? Because I think asking people to go to another Web site is probably not realistic. People are not going to do that. How much can you get into a disclaimer that is fair, that really represents what is happening? Do we need CEOs to be there saying, I approve this ad, and then you have a candidate perhaps, in some cases, doing the same.

That leads to the other question of coordination. The courts threw out, as I understand it, any definitions in terms of coordination. Does that mean that elected officials can call up a CEO and say, hey, why don't you guys go get an ad out for me? I would like that. What is happening then? Where is that line going to be drawn? I think that is a very important one.

The other thing that has been mentioned in terms of unions, and I think that we need to look at the history in terms of the ways that some organizations, some unions have handled this, because they have created a wall of separation in some cases. Someone who chooses not to avail themselves of the benefits of the union and yet is paying for that representation can pay a minimal amount and their dollars do not go to PAC money.

So we already have that. There are places that do that. I think that is worthy to take a look at and understand how that could happen. And, obviously, it will happen in terms of shareholders if we can come up with something that actually is meaningful and works.

So I appreciate the time, and I certainly appreciate the panel being here. Thank you.

The CHAIRMAN. Thank you.

As I said earlier, I wanted everybody to get a chance to speak, and I didn't want anybody's voice not being heard, including all of yours. I thank you for being here.

We would like to introduce the panel.

Mr. Robert Lenhard. Mr. Lenhard is currently of counsel of Covington and Burling D.C. offices and a member of the firm's Election and Political Law Practice Group. Prior to his work with the Covington and Burling law firm, he served as Chairman of the Federal Election Commission in 2007 and Vice Chairman in 2006. He also previously served as Associate General Counsel for the American Federation of State, County, and Municipal Employees.

Judith A. Browne-Dianis. Ms. Browne-Dianis is currently the Co-Director of Advancement Project, a legal action group committed to racial justice and fighting for fair elections. Prior to her work with

the Advancement Project, Ms. Browne-Dianis worked with the NAACP Legal Defense and Education Fund, practicing law in the area of voting rights.

Mary Wilson. Ms. Wilson is the President of the League of Women Voters. Ms. Wilson has been with the League of Women Voters for nearly 20 years in leadership positions at the national, State and local level. Prior to her work with the League, Ms. Wilson was counsel with the United States Department of Energy and the United States Equal Employment Opportunity Commission.

Ms. Torres-Spelliscy is currently counsel with the Brennan Center for Justice Democracy Program. Ms. Torres-Spelliscy has worked to defend campaign finance and public funding laws in courts across the country. Prior to her work with the Brennan Center for Justice, Ms. Torres-Spelliscy was a staff member to Senator Durbin's office and worked at the law firm of Arnold & Porter.

Allison Hayward. Ms. Hayward is an Assistant Professor of Law at George Mason University School of Law where she teaches constitutional law, election law, ethics, and civil procedure. Prior to teaching at George Mason University, Ms. Hayward was counsel to former FEC Commissioner Bradley Smith; an associate at Wiley, Rein & Fielding in Washington, D.C.; and of counsel at Bell, McAndrews & Hiltachk in Sacramento, California—you California guys jumped in on that one.

Steve Simpson. Steve Simpson is a senior attorney with the Institute for Justice, a public interest law firm dedicated to issues of civil liberties. Before coming to the institution, he spent 5 years as a litigator with the national law firm Sherman and Sterling.

I thank all of you for being here today and for testifying.

As I said, we were lax on the 5-minute rule up here. I will be lax on the 5-minute rule down there. But if you get a little too far out, you will see me squirming a little bit, and then I will ask you to sum up. And then there will be time for questions, so you will be able to get—anything you couldn't get in in your statement, I am sure you will be able to answer a question and be able to filter that in, too.

**STATEMENTS OF ROBERT LENHARD, OF COUNSEL, COVINGTON & BURLING LLP; JUDITH A. BROWNE-DIANIS, CO-DIRECTOR, ADVANCEMENT PROJECT; MARY G. WILSON, PRESIDENT, LEAGUE OF WOMEN VOTERS; CIARA TORRES-SPELLISCY, COUNSEL, BRENNAN CENTER FOR JUSTICE; ALLISON HAYWARD, ASSISTANT PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW; AND STEVEN M. SIMPSON, SENIOR ATTORNEY, INSTITUTE FOR JUSTICE**

The CHAIRMAN. Mr. Lenhard.

#### **STATEMENT OF ROBERT LENHARD**

Mr. LENHARD. Thank you.

Chairman Brady, Ranking Member Lungren, distinguished members of the committee, I want to thank you for the opportunity to come and testify today.

As the chairman noted, I have practiced in the area of campaign finance law for close to 20 years, both providing advice and counsel to individuals, unions, corporations, and trade associations to try to

comply with the law, as well as serving as a regulator at the FEC trying to faithfully interpret and enforce the laws that Congress has passed.

This has left me with a number of impressions of the Supreme Court's decision in *Citizens United* and the implications of it; and while I have submitted a somewhat more lengthy written testimony, there are four points that I wanted to raise briefly at the beginning.

The first is that I think the popular perception that this was a dramatic change in the law is correct. For as long as I have been alive, it has been illegal for corporations to make either contributions or expenditures to influence Federal elections. The Supreme Court's decision in *Citizens United* changed that. The Court made clear that the first amendment protects the right of corporations to make expenditures expressly advocating the election or defeat of candidates so long as they do so independently of the candidates. The consequence of this is that there will be more corporate spending in elections, and we can all guess or debate how big we think that increase is going to be.

I like to look at the problem a little differently. I would like to look at it just very briefly from the perspective of candidates, particularly candidates in very closely fought races. Because I think the decision, combined with existing law, makes those candidates particularly vulnerable now, and the reason for that is this:

The Supreme Court has made clear that corporations can spend unlimited sums advocating the election or defeat of candidates, and yet the laws that regulate the collection of those funds, the sources of those funds vary dramatically between corporations and candidates. Corporations can raise those funds through commercial transactions and can spend as much as they have. Candidates are constrained by the contribution limits. They can raise no more than \$2,400 from individuals, \$5,000 for most PACs. And, consequently, my sense is that outside organizations that want to influence close elections can have a great effect by coming in and making very large ad buys very late in the race that are very negative, because my sense is that those kinds of ads can shave several percentage points of support off a candidate, and in a close election they can be decisive.

The problem for a candidate is that if you face that kind of a situation, you are vulnerable in a number of ways. First off, you don't know the money is coming. Your opponent, you can look at their campaign fund-raising reports and see how much they have raised, how much you have, and make some rational budgetary decisions. Money coming from outside groups is unexpected. It is like an ambush.

The second is the amount of money you can raise is limited by the statute, and most of the people whom you can pick up the phone and call and ask for money, you have already asked and they have already given. So as you get to the very last days of a campaign, that money is very, very hard to raise.

And the other thing the law does is, because the prohibition on coordination is still in place and because coordination includes ads spent at the request or suggestion of a candidate, you really can't call up outside groups or even, as the law currently stands, polit-



ical parties and ask them for help. Because, if you do, the spending that follows is an illegal coordinated expenditure or in-kind contribution, which would be illegal, even in a post-Citizens United world.

That is true even for the political parties. Political parties by statute have a very low amount of money which they can spend in coordination with the campaign. Under the Constitution, they can spend unlimited sums independently. But in terms of your reaching out and calling for help, there are very, very few places where you can make that call.

There is a possibility to change that. It will be possible for Congress to repeal the limits on how much a party can spend in coordination with a campaign, and it would provide vulnerable candidates with someplace they can call and seek an influx of money to help balance or counterbalance money coming from outside, especially in the context of Citizens United.

This has, I think, a number of advantages. One is that the money is hard money. It remains under the restrictions of McCain-Feingold prohibiting the use of soft money because all that national party committee money is hard money, and the McCain-Feingold prohibitions remain in place.

Second, because that money can be spent in coordination with a candidate, the candidate retains some control over the message. And one of the problems with outside spending is candidates do lose control of the themes that are driving voters in their elections.

And, lastly—and it is a personal view—I think that it helps strengthen the parties, makes the parties more relevant, which I personally think would be a good thing. Other people may disagree, but I think it does make the parties more central and would provide candidates who are vulnerable—and I think candidates on both sides of the aisle are vulnerable to these outside spending ads—some way to try and help counterbalance that effect.

The next thing I would like to talk about very briefly is disclosure. Congress has created really three different disclosure regimes that cover ads in this area. The first is the disclosure regime that exists within the Federal Election Commission. Entities that qualify as political committees face a relatively rigorous set of disclosure rules. They have to disclose all their receipts and disbursements, and they have to itemize where that money came from or where it went to if it exceeded very low limits—\$200 from money coming in, \$250 for money coming out.

For organizations that do not qualify as political committees—political committees would include PACs as well as candidate committees—for organizations that don't meet those definitions, there are really two different points at which they have to file reports with the FEC. The first is if they make independent expenditures, expressly advocating the election or defeat of candidates. The second is if they make electioneering communications, which was a term Congress created in McCain-Feingold (BCRA), which essentially covers ads that feature candidates and that run very close to an election—30 days with the primary, 60 days with the general—and target in the district in which the Member of the House or the Senate is running.

And there are more abbreviated disclosure forms that organizations that run those kinds of ads have to fill out essentially saying how much they spent, and in certain circumstances where that money came from.

The third disclosure regime you have created covers 527 organizations. These are entities that operate under Section 527 of the Tax Code which covers entities trying to elect or defeat candidates. Congress requires the IRS administer a requirement that those kind of entities disclose where the money came from and what they spent it on to the degree that it reaches slightly higher thresholds—\$500 for money coming in, \$800 for money coming out.

There are a number of exceptions to who has to file those reports with the IRS. And the IRS reports are all on the Internet. You can go right now and log in and call them up.

The first is there are certain kinds of entities that are already reporting somewhere else, and they are exempt from the IRS rule. So, for example, if you are reporting to the FEC, you don't have to also report to the IRS. If you are only involved in State elections and you report to the State, you don't have to report to the IRS. But Congress' goal there was to try and capture the 527 entities a number of years ago when they were quite controversial.

There is an exception there which allows organizations not to disclose donors if they are willing to pay the tax, and the tax is steep. It is the highest corporate rate, which I think runs about 35 percent now. But there have been a couple of groups over time that would rather pay the tax than disclose the source of their contributions.

But as you think about this area of the law, there are really three different areas where you have created existing disclosure regimes.

And the last thing I want to touch on very briefly is coordination, which remains a valid statutory provision. The Court has not struck down the statute. It is illegal to coordinate with campaigns.

There is a great deal of back and forth about what the nuanced interpretations of that law is. The FEC has come up with regulations a couple of times. The courts have struck them down a couple of times. The FEC is in ongoing rulemaking right now as we speak trying to come to grips with that. But there is, I think, some amor-phousness as to what that law exactly means today; and the question of what is coordination and what disclosure exists really, I think, are going to be the two areas of law post-Citizens United that are the most debated.

Thank you very much.

[The statement of Mr. Lenhard follows:]

Congressional Testimony  
House Administration Committee  
Wednesday, February 3, 2010

**Robert D. Lenhard**  
Of Counsel  
Covington & Burling, LLP

Good morning, Chairman Brady, Ranking Member Lungren and distinguished members of this Committee. My name is Robert Lenhard and I am currently Of Counsel at the Washington law firm of Covington & Burling, LLP. I am appearing today in my personal capacity. I have not been retained by any party nor asked by my law firm to represent their interests before this Committee. The views I express today are mine and mine alone.

I have practiced campaign finance law for close to twenty years, and I had the great privilege and honor to serve as an Member of the Federal Election Commission (FEC), an agency where I served as Chair in 2007 and Vice-Chair in 2006. Consequently, I have experience in representing individuals, corporations and unions whose conduct is regulated by the campaign finance laws, as well as in helping to interpret and enforce those laws.

I would like to use my time today to describe briefly the Supreme Court's decision in Citizens United v. FEC and the meaning of that decision for campaign finance law. In doing so, I would like to emphasize one important consequence of that decision, the heightened vulnerability of candidates to ambush ad campaigns, run by outside groups shortly before Election Day. I would also like to suggest a change to the campaign finance laws that could help to restore a balance between the spending power of candidates and outside groups. Finally, I would be happy to respond to any questions you have about this decision and its consequences.

Citizens United v. FEC

In one of the most significant campaign finance law cases in the past half century, the United States Supreme Court in Citizens United v. FEC opened the door to unlimited spending by corporations for election-related advertising -- including ads that expressly advocate the election or defeat of specific candidates -- at the federal, state, and local levels. At the same time, the Court upheld the provisions in the law that require that the sponsor of the ad disclose

how it was funded and include a “disclaimer” in the ad that identifies the sponsor. Whether one sees the decision as overturning 100 years of precedent, or just 20 years of precedent, whether it overturns the holding in two Supreme Court decisions or seven, the popular perception in America that this was a dramatic change to the law is accurate.

Calling it a “ban on speech” inconsistent with the First Amendment, the 5-to-4 Citizens United decision struck down federal statutes that prohibit corporations from making independent expenditures for or against federal candidates. In the wake of this ruling, a corporation may spend unlimited sums on advertising or other forms of communication that expressly advocate in favor of or against the election of a candidate, provided the corporate spending is wholly independent from the candidate and his or her campaign or political party committee. These expenditures may be made either directly, by paying for the ad itself, or indirectly, by contributing to a trade association or outside advocacy group. In the past, corporations were only permitted to fund so-called “issue ads,” which typically focused on a public policy issue important to the corporation and included some call to action (*i.e.*, “Call Congressman Smith and tell him to support H.R. 1000”). This ruling will apply to unions as well as corporations.

The Court also upheld federal laws that (a) require these ads have a disclaimer identifying the sponsor of the ad and whether it was authorized by a candidate or not, and (b) require people who run such ads to file disclosure reports with the FEC. These disclaimer and disclosure provisions apply both to ads that tell viewers to vote for or against a particular candidate (independent expenditures) and to those that tell voters to do something else (“Call Congresswoman Jones and tell her to vote against H.R. 1776”).

There are several important areas in which the Court left the law unchanged. The decision does not address the ban on corporate contributions to candidates and national political parties. As a consequence, corporations (and unions) must still use their PACs if they want to make campaign contributions. Ads that are “coordinated” with a candidate or political party (*i.e.*, that the outside group discusses and plans with the campaign) are still considered direct contributions. Corporations are barred from funding these sorts of coordinated communications and a PAC may do so only up to the contribution limits, which for most PACs is \$5,000 per election.

#### The Effect of Citizens United on Political Campaigns.

*Citizens United* has shifted the balance of power in political contests away from candidates running for office and towards corporations and unions seeking to advance their policy agendas. Candidates are now far more vulnerable to unexpected negative ad campaigns, funded by corporations and unions either directly or through non-profit groups.

Campaigns, corporations and unions can all now spend as much as they want on campaign ads. However, campaign finance laws dramatically limit how much candidates (but not corporations or unions) can raise and from whom. Generally, candidates may only accept contributions up to \$2,400 per election from individuals and up to \$5,000 per election from PACs. In contrast, *Citizens United* allows corporations and unions to spend unlimited sums raised through commercial transactions or membership dues to attack or support candidates. So picture this: An interest group makes a single phone call to raise \$250,000 for attack ads in the waning days of a campaign. The candidate must find more than 100 willing donors, able to give the maximum permissible \$2,400 contribution, to answer those ads with an equivalent buy.

But Congress could take one relatively easy step to restore some balance to the system: it could repeal the limits on how much national political parties can spend in coordination with their candidates. Currently, a political party has three ways it can support candidates: it can make a direct contribution of up to \$5,000 per election; it can make unlimited independent expenditures (in which the party runs ads but may not discuss the ads with the candidate); or it can make limited coordinated expenditures. The current limits on coordinated expenditures are quite low. In House special elections in Illinois, New York and California last year, the coordinated spending limit was \$43,700 per race. In Senate races, the limits vary from as low as \$87,000 in Alaska, Delaware and Vermont to a little under \$2,400,000 per election in California.

There are several advantages to repealing the coordinated spending limit. First, it could provide candidates with a last minute source of cash to counterbalance attack ads from outside groups. Second, the candidate and the party could discuss the content of any ads, leaving the candidate with more control of the campaign's message. Third, the money used for coordinated ads would be governed by the "hard money" rules, preserving the prohibition in the Bipartisan Campaign Reform Act of 2002 (BCRA or McCain-Feingold) on the national parties and federal candidates using "soft money" contributions. Fourth, it would strengthen the role of political parties by making them a more important resource to help determine the outcome of elections.

Important Legal Issues That Remain.

There are two legal issues that will dominate many of the discussions about political speech after Citizens United: what the rules are regarding coordination and disclosure.

*Coordination:* In the wake of Citizens United, corporate election spending is only permitted if the spending is truly independent of the candidate and his or her campaign or political party. Corporations are still prohibited from making contributions to a federal candidate, and corporate expenditures made in coordination with a candidate's campaign are illegal.

Coordination occurs when an individual or entity makes a decision about spending on election advertising in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, the candidate's campaign, the candi

date's agents or a political party committee. In some circumstances, discussions about the content, intended audience, means of communication, specific media outlets used, the timing or frequency, or size or prominence of an advertisement between a candidate's campaign and an outside group may constitute coordination. Use of a common vendor or employment of former campaign staff may also lead to allegations of coordination.

Enforcement likely will now focus not on the *content* of corporate-funded ads but on whether ads have been *coordinated* with a candidate. This heightened attention to coordination comes at a time when there is great uncertainty about its definition. A federal district court threw out the coordination regulations initially enacted by the Federal Election Commission, and the FEC has yet to formally replace those regulations.

*Disclosure:* Congress has established two disclosure regimes for political speech in federal elections. The first is administered by the Federal Election Commission and covers organizations that meet the definition of a "political committee," as well as other persons that engage in certain defined conduct (e.g., making independent expenditures, serving as a conduit for campaign contributions). The second is the statutory requirement that organizations which operate under Section 527 of the Internal Revenue Code file periodic disclosure reports.

The primary part of the FEC's disclosure regime involves organizations that qualify as a "political committee." The statute defines a political committee as a group of persons who raise or spend more than \$1,000 for the purpose of influencing a federal election. The Supreme Court

added two additional requirements. First, the group must have a major purpose of influencing the nomination or election of a federal candidate. Second, when a group is acting independently of a candidate, the definition of “expenditure” only applies to communications that expressly advocate a candidate’s election or defeat. Buckley v. Valeo, 424 US 1, 44, 80 (1976). Once an entity is deemed to be a political committee, it must register with the FEC and file periodic reports that disclose all of its receipts and disbursements, as well as itemizing receipts from persons who give more than \$200 in a year and disbursements that exceed \$250 in a year.

The FEC regime also requires persons (which would include individuals, partnerships, corporations, unions, etc.) to file more compact disclosure reports when they engage in certain kinds of activity. The two most relevant of these are the duty to disclose independent expenditures and electioneering communications.<sup>1</sup>

Independent expenditures are ads that explicitly tell people who to vote for or against. They are defined in the Federal Election Campaign Act of 1971, as amended, (FECA) as expenditures that expressly advocate the election or defeat of a clearly identified candidate that are not made in concert or cooperation with or at the request or suggestion of the candidate featured in the ad, the candidate’s authorized political committee, or their agents, or a political party committee or its agents. 2 U.S.C. § 431(10).

If the independent expenditures add up to more than \$250 with respect to a single election during a calendar year, the person making the expenditure must file a report with the FEC.<sup>2</sup> That disclosure report must contain:

- their identity;
- the amount they spent on the independent expenditure;
- the candidate for whom it was in support of or opposition to;

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<sup>1</sup> Other examples include a requirement that persons who serve as conduits of federal campaign contributions file a report. Similarly, corporations and unions must report if they spend more than \$2,000 advocating a candidate’s election or defeat to their employees and/or members.

<sup>2</sup> Different rules apply to PACs. This is a rule only for persons who otherwise would not be required to report their activities to the FEC.

- a certification that it was not made in cooperation, consultation, or concert with or at the request or suggestion of a candidate or any authorized committee agent of the candidate;
- the identification of each person who made a contribution in excess of \$200 for the purpose of furthering an independent expenditure. 2 U.S.C. § 434(c)(2).

Reports of independent expenditures are due either 24 or 48 hours after the ad airs or the contract to make the ad is entered into, depending on the amount spent and the number of days prior to the election the ad airs. 2 U.S.C. § 434(d).

Electioneering communications are broadcast, cable, or satellite communications which refer to a clearly identified federal candidate, are made within 60 days of a general election (or a special or runoff election) or 30 days of a primary or preference election (or a caucus or convention of the party with authority to nominate the candidate) and (if the ad features a Senator or a Representative) are targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A). Generally an organization that makes disbursements to produce and air an electioneering communication that exceeds an aggregate amount of \$10,000 during a calendar year has two choices when it comes to disclosure. It can pay for the ads from a separate segregated account used exclusively for electioneering communications, in which case it must report the identity of only those donors who contribute more than \$1,000 to that account. In the alternative, the organization can pay for the ads from its general treasury funds, in which case it must identify all donors of more than \$1,000 to its treasury account. Corporations and unions that make electioneering communications operate under a somewhat different disclosure regime after the Supreme Court's decision in Wisconsin Right to Life v. FEC, which struck down the prohibition on corporations and unions funding electioneering communications. Corporations and unions must only disclose the identity of persons who contribute \$1,000 or more "for the purpose of furthering electioneering communications." 11 CFR § 104.20(e)(9). Any person who spends more than \$10,000 during a calendar year for the direct costs of airing electioneering communications must file a disclosure report with the FEC within 24 hours of doing so.

#### The IRS Disclosure Regime for Section 527 Organizations.

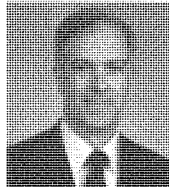
Federal law requires all organizations that operate under Section 527 of the Internal Revenue Code to register and file periodic disclosure reports. There are several statutory



exceptions to either or both of these requirements. For example, state candidate committees, organizations that expect annual gross receipts of less than \$25,000, and organizations that register and report to the FEC are exempt from both the duty to register and to file disclosure reports with the IRS. Organizations solely devoted to electing candidates to state or local office are exempt from having to file federal periodic reports so long as they file state reports that provide similar levels of disclosure to the IRS form. Organization that are required to file disclosure reports can choose to do so either monthly or on a semi-annual/quarterly basis. The IRS reports include, among other information, the name and address of every person who contributes a total of \$500 or more during the year, and those individuals who receive more than \$800 in disbursements from the organization.

Thank you very much for this opportunity to testify.

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**Practices**

- Government Affairs
  - Election & Political Law

**Education**

- University of California at Los Angeles School of Law, J.D., 1984
- Johns Hopkins University, B.A., 1981
  - with honors

**Bar Admissions**

- District of Columbia

Robert Lenhard is of counsel in the firm's Washington, DC office and a member of the firm's Election & Political Law Practice Group.

Mr. Lenhard served as Chairman of the Federal Election Commission in 2007 and Vice Chairman of the agency in 2006. Mr. Lenhard also led the Presidential Transition Team that reviewed the FEC for the incoming Obama administration in 2008-2009.

Mr. Lenhard provides advice and counsel to major corporations, trade associations, politically active nonprofit groups and candidates in complying with federal and state campaign finance and lobbying disclosure laws and pay-to-play rules, including:

- Conducting internal compliance trainings and audits of federal and state lobbying and political programs;
- Establishing and operating federal and state PACs;
- Providing advice to advocacy groups and their donors on television advertising campaigns in proximity to federal elections; and
- Aiding compliance with congressional gift and travel rules.

During his tenure at the FEC, the agency achieved major accomplishments in rulemaking, enforcement and reforms in agency practices.

The agency handled over 10 major rulemakings, including ones that:

- Defined when issues advocacy groups are regulated by the FEC;
- Addressed the use of the Internet in political campaigns; and
- Laid out permissible and prohibited coordination between candidates and outside groups in political campaigns.

In enforcement and audits, the FEC had the two most productive years in its 32-year history. The agency processed near-record numbers of cases, increased the collection of penalties and reduced case processing time. In addition, the agency completed over 40 audits of political committees. While increasing its efficiency in these areas,



during Mr. Lenhard's leadership the FEC also embarked on several reforms that had a significant impact on parties' interactions with the agency. For instance, the agency adopted a process that allows for expedited resolution and significantly reduced penalties in cases where respondents self-report their violation; created a safe harbor for reporting violations that arise from embezzlement; and introduced pre-probable cause hearings for respondents before the commissioners vote on bringing suit.

Prior to joining the FEC, Mr. Lenhard provided legal advice to organizations active in the political process at the federal, state and local levels. He represented clients in planning and implementing political strategies as well as appearing in matters before the Federal Election Commission and state regulatory agencies. Mr. Lenhard was also involved in litigation in the Florida trial and appellate courts over the counting of absentee ballots in Seminole County, Florida in 2000.

#### PREVIOUS EXPERIENCE

- Federal Election Commission, Commissioner
- American Federation of State, County and Municipal Employees, Associate General Counsel

#### PUBLICATIONS AND SPEECHES

- Author, Introduction, "America Votes: A Guide to Modern Election Law and Voting Rights," *American Bar Association, Section of State and Local Government Law*, Benjamin E. Griffith, Editor. (2008)
- Mr. Lenhard has testified in Congress before the Senate Indian Affairs Committee, the Honorable John McCain, Chairman on the legal status of political contributions by Indian tribes (February 8, 2006).
- Mr. Lenhard has also made numerous speeches and presentations on campaign finance law, including presentations sponsored by the Public Affairs Council, the Practicing Law Institute, National Association of Business Political Action Committees, the Bureau of National Affairs (BNA), Lobbyist Info, and the California Treasurers Association.
- Mr. Lenhard has spoken frequently on the issues of campaign finance law to international audiences, including presentations at the Global Electoral Organization Conference in 2007, at the Korean Economic Institute, the American University's program for Persian Gulf state officials, and before numerous International visitor forums at the FEC. Mr. Lenhard served as an election observer during the Ecuadorian elections in 2006.

#### PUBLICATIONS

- "Called to Serve: The Presidential Appointment Vetting Process," *Covington E-Alert* (2/1/2010), Co-Author

- "Citizens United: Supreme Court Opens the Door for Unlimited Corporate Election Spending," *Covington E-Alert* (1/21/2010), Co-Author
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- "The Effect of New Form 990 on Section 527 Political Organizations and Other Tax-exempt Entities," (8/22/2008), Co-Author
- "Revised Guidance for LD-203 Reporting Issued by the Clerk of the House and Secretary of the Senate," *Covington E-Alert*



(7/17/2008), Co-Author

- "Clerk of the House and Secretary of the Senate Finally Go Live with HLOGA Semi-Annual Certification," *Covington E-Alert* (7/1/2008), Co-Author
- "The Federal Election Commission is Back in Business," *Covington E-Alert* (6/25/2008), Co-Author

The CHAIRMAN. Thank you.  
Ms. Browne-Dianis.

**STATEMENT OF JUDITH A. BROWNE-DIANIS**

Ms. BROWNE-DIANIS. Thank you, Chairman Brady and members of the committee.

My name is Judith Browne-Dianis and I am Co-Director of Advancement Project, a civil rights organization that supports organized communities in their struggles to achieve universal opportunity in a just democracy.

Almost since our inception Advancement Project has been involved in the important voting rights issues of our day, including issues related to the administration of elections, and the elimination of barriers to voting through our voter protection program. We have been advocating for the automatic restoration of voting rights of persons with felony convictions. We have represented communities of color in redistricting. And, lastly, we have initiated a campaign for a constitutional amendment for a right to vote.

In addition to the written testimony I submitted, I would like to note a few things.

First, I wanted to note the irony of having this discussion today about a case opening the door to the unbridled corporate influence on elections on the anniversary of the ratification of the 15th amendment, which happened on February 3, 1870, prohibiting the denial of the vote on the basis of race, color, or servitude.

The Supreme Court's decision in *Citizens United* clearly ushers in a new and unprecedented era of direct corporate wealth influence in our elections. This means that lower- and middle-income Americans, who comprise the clear and overwhelming majority of the country, will have much less of an opportunity to gain access to and interact with their political representatives or to help shape the debate in ways that serve the interests of the majority of Americans.

But the wealth disparity in campaign finance is not just an issue of class. It is also an issue of race. Unfortunately, we still live in a country where race and wealth are intertwined such that people of color have accumulated less wealth; and, under this new regime, this corporate takeover of our democracy, the voices of people of color will be drowned out in the efforts to influence the outcomes of our elections.

Given the historical and lingering racial disparities in wealth distribution and transfer caused by government and private actions over hundreds of years, coupled with the low representation of people of color in the management sphere of our Nation's largest corporations and the overwhelmingly white demographic of major campaign contributors, it is easy to see why any campaign finance regime that allows and relies heavily upon private financial contributors, especially major corporations, would structurally exclude people of color from any significant degree of effective political influence.

To alleviate the racially discriminatory burdens of money and wealth in the campaign finance system, Congress must act boldly to strengthen public financing in all Federal and State elections, including passing the Fair Elections Now Act, establishing direct

expenditure and electioneering limits on all Federal contracts, and requiring States that receive Federal election funds to amend their laws to require explicit shareholder and member approval for electioneering expenditures.

What is also disconcerting about the Citizens United decision is the Supreme Court's willingness to sell our democracy off to the highest corporate bidder in the name of free speech and participation while in other instances eviscerating protections for citizens—real, live people—to have their voices heard by voting. The Court applied the most restrictive standard of review in its consideration of whether the campaign finance statute issued in Citizens United ran afoul of the first amendment, but it is not so exacting when it comes to looking at barriers to voting.

Specifically, in Citizens United, the Supreme Court determined that political speech of corporations was subject to strict scrutiny under the first amendment, requiring a compelling State interest to infringe upon that right. Yet when considering Indiana's law requiring voter identification in the Crawford case, the Court departed from past precedent and used a less stringent standard of review where there was a clear burden on the opportunity to vote. It is outrageous that voting is not entitled to review under the most stringent protections that now apply to corporate influence in the outcomes of elections.

As Justice Stevens rightly noted in his dissent, "While American democracy isn't perfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."

To ensure vigorous protection of individual voting rights, Advancement Project urges Congress to enact House Joint Resolution 28 to amend the Constitution to enshrine an express right to vote. We do not have a right to vote in this country, along with 11 other democracies and Iran and Libya. Without a Federal guarantee of the right to vote, the judiciary will continue to regard voting rights as something to be balanced while still claiming them as fundamental, and States will continue to use their vast control over this basic citizenship right in a patchwork quilt of arbitrary rules with vast consequences for close elections.

Finally, Congress should realize that voting is the last frontier of our democracy. No matter how much money corporations may choose to spend to influence elections in the political debate in the wake of Citizens United, the one thing they will never be able to do—at least I hope—is to cast a ballot on Election Day. It is therefore incumbent upon Congress to ensure that all American citizens, especially traditionally disadvantaged and disenfranchised citizens of color, do not encounter needless roadblocks to registration and voting. To that end, Advancement Project urges Congress to enact the Protection Against Wrongful Voter Purges Act, which amends the NVRA and HAVA in a number of ways to strengthen protections against the wrongful removal of registered voters from the roles and the wrongful denial or delaying of voter registration applications.

Advancement Project also recommends that Congress enact the Provisional Ballot Fairness in Counting Act of 2009, H.R. 3552, which would eliminate the wrong precinct rules that relates to

counting provisional ballots in fair elections. In particular, it would require that provisional ballots cast by a voter registered anywhere in the State be counted for President and Senate elections and ballots cast in correct congressional districts be counted for U.S. representatives.

These two bills would provide immediate fixes to many of the perennial voter registration and list maintenance issues that have prevented eligible voters from becoming registered to vote and have their ballots counted since the 2000 elections.

In the longer term, Congress should work to improve voter registration by enacting legislation that will require automatic registration of all eligible voters and permit Election Day registration to those who are not already registered.

We clearly believe that in light of Citizens United we must strengthen our democracy by ensuring that individuals who are actually eligible to cast a ballot have an opportunity to do that. This is the only way to balance out the power corporations have been given. The one great equalizer, in our democracy is going into the election booth to cast that ballot. This must be a protected right in order to secure our democracy.

Thank you very much.

[The statement of Ms. Browne-Dianis follows:]





**Testimony of Judith A. Browne-Dianis  
Co-Director, Advancement Project**

**Hearing on “Defining the Future of Campaign Finance in an  
Age of Supreme Court Activism”**

**Before the Committee on House Administration  
Washington, DC  
Wednesday, February 3, 2010**

Chairman Brady and Members of the Committee on House Administration, my name is Judith Browne-Dianis. I submit this testimony today in my capacity as Co-Director of Advancement Project—a policy, communication, and legal action civil rights organization that supports organized communities in their struggles to achieve universal opportunity and a just democracy. Voter protection is a central component of Advancement Project’s Power and Democracy Program. We commend our partners, including Common Cause and Voter Action, for their vigilant, longstanding advocacy on campaign finance reform efforts. Their work has allowed groups like ours to maintain a full focus on supporting a wide variety of community-based efforts to increase civic participation, improve election administration, and remove structural barriers to electoral participation in low-income communities of color.

In the wake of unprecedented judicial activism in the area of campaign reform law, however, we recognize that all our groups must work together to prevent the erosion of citizen participation, especially in communities in color. We realize, in particular, the urgency in joining our partners in identifying the specific harms that could be generated under newly permitted candidate-centered corporate spending during elections. For that reason, we thank you for this

opportunity to testify about the potential impact of the *Citizens United v. FEC*<sup>1</sup> decision on racial minority groups.

The struggle to gain equal voting rights in our nation for citizens of color has been a long and painful one. People have suffered, bled, and died to ensure that individuals can express their voices equally through the ballot box. Equating the rights of corporations to the rights of individuals in an election context defies logic and trivializes the movement to gain the right to vote that was secured by the blood of too many Americans.

On January 21, 2010, by a 5-4 vote, the Supreme Court struck down a provision of the McCain-Feingold campaign finance law that prohibited corporations, including unions, from using their general treasury funds to make an “electioneering communication,” which is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and that is made within 30 days of a primary election or 60 days of a general election.<sup>2</sup> Certainly this ruling ushers in a new, unprecedented era of direct corporate wealth influence in our elections in ways never before imagined. The literature suggests that this large influx of private corporate wealth in federal, state, and local elections will have a particularly devastating impact on communities of color, which lack comparable resources with which to fund competing ads. This disparity is due, in large measure, to the lingering negative effects that racial discrimination has had in the distribution of property in the United States.

As former law professor Spencer Overton noted, “Governmental entities have long used racial identity to define and allocate property rights.”<sup>3</sup> For example, official government actions and policy stripped Native Americans and Mexican Americans of their land in this country, subjugated African-Americans to slavery and reaped the benefits of their labor, promoted

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<sup>1</sup> *Citizens United v. FEC*, No. 08-205, \_\_\_\_ U.S. \_\_\_\_, 2010 U.S. LEXIS 766 (Jan. 21, 2010).

<sup>2</sup> 2 U.S.C. §§ 441b, 434(f)(3)(A).

<sup>3</sup> Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 1004 (Apr. 2002).

immigration from European countries over others, and even sanctioned racially restrictive covenants as a condition of federal loan guarantees.<sup>4</sup> All of these officially sanctioned actions specifically inured to the benefit of White non-Hispanic Americans, and the intergenerational transfers of wealth that have happened since the abandoning of those policies have only exacerbated the racial disparities.<sup>5</sup>

People of color, by and large, do not proportionally control the nation's wealthiest businesses. Indeed, as of November 2008, there were only 15 minority CEOs at Fortune 500 companies.<sup>6</sup> In 2006, people of color held just 188 board seats out of the 1,219 board seats at Fortune 100 companies.<sup>7</sup>

People of color are also significantly less able to make individual financial contributions to political campaigns. According to a study of the 2004 presidential primary race, all the major 2004 presidential candidates (including President George W. Bush, Sen. John Kerry, and the two African-American candidates, Sen. Carol Moseley Braun and Rev. Al Sharpton) raised the majority of their individual contributions of more than \$200 from majority White non-Hispanic neighborhoods.<sup>8</sup> Just one ZIP code in the Upper East Side of Manhattan, containing 91,514 adults, contributed more funds than 377 ZIP codes with the largest percentage of African Americans (containing 6.9 million adults), 365 ZIP codes with the largest percentage of Latino

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<sup>4</sup> *Id.*

<sup>5</sup> For example, Professor Overton notes that in 1995, "the median net worth for white households (\$61,000) was over eight times greater than for African-American households (\$7,400) and over twelve times greater than for Latino households (\$5,000). *Id.* at 1009 (citing Chuck Collins & Felice Yeskel, UNITED FOR A FAIR ECONOMY, ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY & INSECURITY 55, 57 fig. 10).

<sup>6</sup> Latif Lewis, *Yang, Thompson Departures to Further Diminish Pool of Minority CEOs*, Blogging Stocks (Nov. 19, 2008), available at <http://www.bloggingstocks.com/2008/11/19/yang-thompson-departure-to-further-diminish-pool-of-minority-ceo/> (last accessed Feb. 1, 2010).

<sup>7</sup> The Alliance for Board Diversity, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS (2008), available at [http://www.elcinfo.com/downloads/docs/Final\\_1\\_22\\_08.pdf](http://www.elcinfo.com/downloads/docs/Final_1_22_08.pdf) (last accessed Feb. 1, 2010).

<sup>8</sup> Public Campaign, the Fannie Lou Hamer Project, and the William C. Velasquez Institute, COLOR OF MONEY: THE 2004 PRESIDENTIAL RACE—CAMPAIGN CONTRIBUTIONS, RACE, ETHNICITY, AND NEIGHBORHOOD (2004), available at [http://www.colorofmoney.org/report/2004\\_cofm\\_pres\\_complete.pdf](http://www.colorofmoney.org/report/2004_cofm_pres_complete.pdf) (last accessed Jan. 31, 2010).

Americans (containing 9.1 million adults), and 123 ZIP codes with the largest percentage of Asian Americans (containing 2.8 million adults).<sup>9</sup>

Given the historical and lingering racial disparities in property distribution and transfer and in net worth accumulation, coupled with the low representation of people of color in the management sphere of our nation's largest companies and the overwhelmingly White non-Hispanic demographic of major campaign contributors, it is easy to see why any campaign finance regime that allows and relies heavily upon large private financial contributors—especially major corporations—would structurally exclude people of color from any significant degree of effective political influence.

So how should Congress address this issue in the wake of *Citizens United*? Some public interest organizations suggest that the U.S. Constitution should be amended to clarify that the rights secured under the First Amendment do not extend to artificial entities such as corporations, but may only be claimed by natural persons.<sup>10</sup> That is certainly an idea that merits serious consideration. However, there are a number of things that Congress can do right now, short of amending the Constitution, to address the *Citizens United* opinion and ameliorate the negative effects thereof on low-income communities of color. Advancement Project respectfully recommends the following five steps:

- 1. Strengthen public financing of all federal elections by passing the Fair Elections Now Act (S. 732 / H.R. 1826).**

The Fair Elections Now Act is a federal “clean elections” bill modeled after successful statewide public financing legislation in Arizona, Connecticut, and Maine. The bill would allow federal candidates to choose to run for office without relying on large contributions, big money

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<sup>9</sup> *Id.* at 3-4.

<sup>10</sup> Voter Action Press Release, *Public Interest Groups and Independent Business Advocates Condemn Supreme Court's Ruling On Corporate Money In Elections* (Jan. 21, 2010), available at <http://www.voteraction.org/news-article/2010/public-interest-groups-condemn-supreme-courts-ruling-corporate-money-elections>.

bundlers, or donations from lobbyists, and would be freed from the constant fundraising in order to focus on what people in their communities want. To qualify for the funding, candidates would have to raise a large number of small contributions (usually less than \$200) from residents in their state or congressional district. The funding covers the primary election and (for the primary winner) the general election.

**2. Establish direct expenditure and electioneering limits on all federal contractors (individual and corporate).**

Yale Law professors Bruce Ackerman and Ian Ayres have championed this measure as an effective and constitutionally permissible way to target the majority of large companies that do business with the federal government.<sup>11</sup> Under their proposal, which they say would reach approximately 75% of the 100 largest publically traded companies, all federal contractors would be banned from “endorsing or opposing a candidate for public office.”<sup>12</sup>

**3. Require all states that receive federal elections funds to amend their corporate and business entity laws to require explicit shareholder/member approval for electioneering expenditures.**

Corporations and other business entities, such as LLCs, are fictional entities created by state law. Most of these laws require specific advance shareholder or member approval for significant business transactions, such as a sale of a certain percentage of the company’s assets. Many commentators have suggested that shareholder approval should be required for direct electioneering expenditures by corporations.<sup>13</sup> One way that Congress could “nationalize” this

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<sup>11</sup> Bruce Ackerman and Ian Ayres, *Despite Court Ruling, Congress Can Still Limit Campaign Finance*, Washington Post (Jan. 26, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/25/AR2010012502970.html> (last accessed Jan. 31, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> See e.g. Fredreka Schouten & Joan Biskupic, “It’s a new era for campaign spending; High court rejects limits on well-funded backers” *USA Today*, 1A (Jan. 22, 2010) (options for congressional solutions to Citizens United include requiring advance shareholder approval of political spending and mandating that corporate CEOs and union heads appear in any advertising they fund); David D. Kirkpatrick, “Lobbies’ New Power: Cross Us, And Our Cash Will Bury You”, *The New York Times*, Section A; Column 0; National Desk; Pg. 1 (Jan. 22, 2010) (noting a potential response to the case would include a requirement to have shareholder approval of

standard is to tie compliance with federal funding. As the Supreme Court has noted, “Congress may attach conditions on the receipt federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”<sup>14</sup> A bill recently introduced by Rep. Michael Capuano called the Shareholder Protection Act of 2010 (H.R. 4537) would amend the Securities and Exchange Act to require this condition for all public companies. The federal funds approach would possibly provide a more broad-based way to achieve uniformity, since it would impose upon states the duty to amend *all* corporate and business entity laws, for public and non-public companies alike, to require shareholder approval.

4. **Evaluate the feasibility of creating a federal “Equal Opportunity in Electoral Participation Act,” pursuant to the Congress’s enforcement powers under the 13<sup>th</sup> and 14<sup>th</sup> Amendments, to ensure that people of color—who have been victims of *de jure* racial discrimination in property distribution and who continue to suffer the negative effects of such discrimination as a result of the intergenerational transfer of wealth—have an equal opportunity to participate in all stages of the political process (federal, state, and local) without regard to income or wealth.**

As Jamin Raskin and John Bonifaz have noted, “the tyranny of private money corrupts the democratic relationship of one person/one vote by making it exceedingly difficult for poor or middle-class persons to run for office, by leaving them without meaningful electoral choices, and by assuring that wealthy interests will set the parameters of political debate and the nature of the

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political expenditures, or even to force chief executives to appear as sponsors of commercials their companies pay for.); Alan Wirzbicki, “Capuano seeks to limit ruling’s effect; Wants shareholder approval for most political donations”, *The Boston Globe*, Pg. 7 (January 30, 2010) (US Representative Michael E. Capuano is proposing to limit the impact of a Supreme Court decision on campaign financing by requiring companies to seek shareholder approval for most political donations. The legislation would apply to any corporate donation of more than \$10,000. Executives would have to convene a shareholder vote to get permission to spend such money for any political purposes. It would also require companies to report such expenditures quarterly to shareholders).

<sup>14</sup> *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987) (21-year-old drinking age), citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

legislative agenda.”<sup>15</sup> By adopting a robust system of total public financing with mandatory expenditure limitations pursuant to its enforcement power under Section 5 of the Fourteenth Amendment, Congress could constitutionally ensure a meaningful opportunity for low-income citizens to participate effectively in the political process.<sup>16</sup> In addition, given the history of racial discrimination, discussed earlier, that has created this structural barrier to wealth accumulation in communities of color, Congress has additional enforcement authority under both the Thirteenth and Fourteenth Amendments that would justify such a mandatory public financing system.

Under such a system, Congress could constitutionally mandate electioneering expenditure limits on individuals and corporate entities. For example, in a given statewide election, individuals and business or nonprofit entities may each have a \$5,000 base limit on electioneering expenditures. In addition, subject to shareholder/member approval, for-profit entities may be entitled to a per-person enhancement based on the number of employees it has in a given jurisdiction (e.g., \$200 per employee). Similarly, non-profit entities may be entitled to a per-person enhancement based on the number of financial contributors it had in a jurisdiction (e.g., \$200 per individual contributing \$10 or more dollars in the past 2 years). Thus, if Wal-Mart had 20,000 employees working in a particular state and the Sierra Club Action Fund had 5,000 qualifying financial contributors in the same state, Wal-Mart could spend up to \$4,005,000 in electioneering expenditures for statewide offices, and the Sierra Club could spend up to \$1,005,000.

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<sup>15</sup> Jamin Raskin & John Bonifaz, *Restoring Faith in Government: Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 277 (1993).

<sup>16</sup> *Id.* at 313.

- 5. Modernize America's voter registration system and, in the short term, pass needed fixes to NVRA and HAVA to ensure that all eligible citizens may register without onerous and unnecessary barriers and that, once registered, they may remain on the rolls without being subjected to unwarranted purges.**

No matter how much money corporations may choose to spend to influence elections and the political debate in the wake of *Citizens United*, the one thing they will never be able to do is cast a ballot on Election Day. This is a right that is reserved to natural persons.<sup>17</sup> In that sense, then, voting is the “last frontier” of our democracy. Therefore, now more than ever, Congress must act to ensure that all of America's citizens—particularly traditionally disadvantaged and disenfranchised citizens of color and low-income citizens—do not encounter needless roadblocks in registration and voting.

To that end, Advancement Project urges Congress to improve voter registration by enacting legislation that would require automatic registration of all eligible voters and permit eligible voters who do not become registered automatically to register to vote on Election Day.<sup>18</sup> Legislation to automate and modernize voter registration should be crafted with particular emphasis upon ensuring the registration of eligible voters from historically disenfranchised communities, particularly low-income communities of color. It should also ensure that non-citizens who are inadvertently registered to vote due to automatic registration are not placed at risk of deportation proceedings or other adverse legal consequences.

In the nearer term, Congress should take immediate steps—in advance of the 2010 federal elections—to address the registration barriers and list maintenance issues that remain in place even after the enactment of the National Voter Registration Act of 1993<sup>19</sup> and the Help

<sup>17</sup> *But cf. Citizens United*, 2010 U.S. LEXIS at \*198 (Stevens, J., dissenting in part) (“Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.”)

<sup>18</sup> For general background on the topic of modernizing the voter registration process, *see* [http://www.brennancenter.org/content/pages/voter\\_registration\\_modernization](http://www.brennancenter.org/content/pages/voter_registration_modernization) (last accessed Feb. 1, 2010).

<sup>19</sup> 42 U.S.C. § 1973gg *et seq.*



America Vote Act of 2002.<sup>20,21</sup> In particular, we urge Congress to enact two bills sponsored by Rep. Rush Holt of New Jersey: H.R. 3835, the Protection Against Wrongful Voter Purges Act, and H.R. 3552, the Provisional Ballot Fairness in Counting Act. These bills, which have been referred to this Committee, would remedy many of the perennial voter registration and list maintenance issues that have prevented eligible voters from becoming registered to vote and have their ballots counted since the 2000 elections.

\* \* \*

Thank you for your kind consideration of my testimony and for ensuring that all voters have the opportunity to vote, have their vote counted, and receive equal protection under the law. Advancement Project is pleased at any time to provide technical advice, assistance, and testimony to this Committee as it develops legislative reforms that will safeguard the ability of eligible voters to participate in elections.

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<sup>20</sup> 42 U.S.C. §§ 15301 to 15545.

<sup>21</sup> For general background on registration and voting barriers encountered during and in advance of the 2008 election cycle, see Advancement Project, NAACP National Voter Fund and Voter Action, *Uncovering Flaws in Election Administration: A Joint Report on the 2008 Presidential Election Based on CNN and MYVOTE1 Voter Hotline Data* (Jul. 23, 2009), available at [http://www.voteraction.org/files/Report\\_RS\\_Final.pdf](http://www.voteraction.org/files/Report_RS_Final.pdf) (last accessed Feb. 1, 2010).

Judith Browne-Dianis has an extensive background in civil rights litigation and advocacy in the areas of voting, education, housing, and employment. Browne-Dianis has worked tirelessly to protect survivors of Hurricane Katrina. Browne-Dianis filed critical litigation to protect the rights of displaced survivors, stopping mass evictions from rental units and the bulldozing of homes without notice to the families impacted. She then led the charge to stop the demolition of habitable public housing in New Orleans by filing litigation, and worked with Congress to ensure the right to return for these families. Her efforts to stop the exploitation of immigrant reconstruction workers in the Gulf Coast, led to the establishment of the New Orleans Workers Center for Racial Justice.

Under Browne-Dianis' leadership, Advancement Project has been dismantling the school-to-prison pipeline in school districts throughout the country since 1999. Browne-Dianis has authored groundbreaking reports on the issue including: *Derailed: The Schoolhouse to Jailhouse Track*, detailing the unnecessary criminalization of students by their schools. Working closely with grassroots organizations, including the NAACP, Advancement Project's work has significantly decreased student arrests in Denver, Chicago and Florida. Browne-Dianis' commitment to racial equity in public schools carries over to her positions on the Board of FairTest, and she is a founding Convener of the Forum for Education and Democracy.

Browne-Dianis' efforts to protect voters of color span years of dedication. In 1996, she filed pioneering litigation against the State of Maryland for failure to enforce the "Motor Voter" law in public assistance and motor vehicle agencies. After the 2000 election debate, she served as counsel on behalf of the NAACP and disenfranchised African-American voters in Florida. Her voter protection efforts continued in 2004, when Browne-Dianis worked to prohibit the use of the erroneous Florida felon purge list, and served as counsel in *DNC v. RNC*, which stopped the RNC from challenging voters of color based upon an illegal voter caging program. Most recently, Browne-Dianis represented the Virginia NAACP in litigation against the Commonwealth of Virginia and several jurisdictions for racial disparities in the allocation of voting machines.

She is a recipient of the distinguished Skadden Fellowship and joined Advancement Project at its inception in 1999, after serving as the Managing Attorney in the Washington, D.C. office of the

NAACP Legal Defense & Educational Fund, Inc. Browne-Dianis is a graduate of Columbia University School of Law, served as a Tobias Simon Eminent Scholar at Florida State University Law School and is currently an Adjunct Professor of Law at Georgetown University Law Center. Browne-Dianis sits on the board of the 21<sup>st</sup> Century Foundation and was named one of the "Thirty Women to Watch" by *Essence Magazine*.

The CHAIRMAN. Thank you.  
Ms. Wilson.

**STATEMENT OF MARY G. WILSON**

Ms. WILSON. Thank you.

Mr. Chairman, members of the committee, I am Mary Wilson, President of the League of Women Voters of the United States. I am very pleased to be here this afternoon to talk to you about the League's support for legislation that would protect our electoral system in the wake of *Citizens United v. FEC*.

There is one simple message that I hope the committee members will take away from the hearing this afternoon; and that is: because the 2010 elections are fast approaching, it is imperative for Congress to act swiftly to pass legislation and send to the President for signature legislation that governs corporate and union spending. That legislation must take effect immediately. Waiting until after the 2010 elections is simply not a viable option.

The League of Women Voters of the United States has for the last 90 years been working to educate voters, register voters, and make sure that citizens have an opportunity to participate in our electoral process. I can tell you without a doubt that voters want election results that reflect their honestly held opinions, not results that derive from big money in elections. The voters depend on you, their elected representatives in Congress, to protect that open, honest government and a healthy democracy.

The Court's decision in *Citizens United* upends basic campaign finance law that Congress has carefully crafted over many years. This fundamental change—with perhaps more coming as the Court considers other cases—requires a strong response from Congress and the President. Now, I must say we do not expect that legislation that would be adopted this year can address every possible issue, but some basic voter protection can and must be enacted this year.

There are numerous protections that could be enacted, and in my lengthy written statement there are a number of issues that I raise, but I want to talk today about enhanced disclosure. It is the most basic step toward protecting the role of the voter in making decisions in elections.

The *Citizens United* decision appears to make it possible for corporations, and perhaps unions, to secretly use funds that they receive from another corporation to intervene in an election. This is not acceptable. Voters need information about the sources of funding for those charges and countercharges that always come during election campaigns. This is basic. It is one of the few ways by which a voter can test the accuracy of campaign statements. And I must say, indeed, the Court in *Citizens United* supported such requirements, as they said, "so that the people will be able to evaluate the arguments to which they are being subjected." We couldn't agree more with that statement.

The League of Women Voters supports strong disclosure requirements for both those who receive election funds and those who provide such funds. For example, if corporation A receives significant funds from corporation B and subsequently makes an election expenditure, then corporation A should disclose both its own expendi-

ture and the contribution from corporation B, and corporation B should disclose its contributions to corporation A.

We believe that corporations should have the responsibility for providing disclosure to the public, through disclaimers and on the Internet, directly to their stockholders or members, as the case may be, and to the Federal Election Commission and the Securities and Exchange Commission.

Disclaimers on public communications should be required for every corporation that provides funds above a certain amount either directly or indirectly to an election expenditure. The Supreme Court clearly approved of disclaimers in *Citizens United* and in fact remarked that, "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

After providing enhanced disclosure, the next most important step for Congress is to do no further harm. A decision as far-reaching in its implications as *Citizens United* will, I am sure, provoke a number of proposals that we, the League of Women Voters, believe could make our election system and our government processes worse.

Some, I am sure, will call for increasing or doing away with contribution limits to candidates and PACs. There will likely be calls to allow corporations and unions once again to make huge contributions to political parties, effectively repealing the soft money ban in BCRA. There may even be those who call for unlimited corporate and union contributions to candidates.

On behalf of the League of Women Voters, I strongly urge you not to do any of these things. Each of these steps would increase corruption or the appearance of corruption. We need fair elections, not greater involvement of big money in elections and government.

In conclusion, the League of Women Voters believes that the Court's majority decision in *Citizens United* was fundamentally wrong and a tragic mistake, but this is the decision of the Court. Congress needs to respond now, recognizing its own authority and responsibility to uphold the Constitution and protect the voters. Fair and clean elections, determined by the votes of American citizens, should be at the center of our democracy.

Thank you.

[The statement of Ms. Wilson follows:]



STATEMENT  
BY  
MARY G. WILSON, PRESIDENT  
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES  
BEFORE THE  
COMMITTEE ON HOUSE ADMINISTRATION  
ON  
"DEFINING THE FUTURE OF CAMPAIGN FINANCE  
IN AN AGE OF SUPREME COURT ACTIVISM"

Wednesday, February 3, 2010

Mr. Chairman, members of the Committee, I am Mary G. Wilson, president of the League of Women Voters of the United States. I am very pleased to be here today to voice the League's deep concern about the Supreme Court's recent decision in *Citizens United v. FEC* and our strong support for legislation to address the problems it creates for our electoral system. The League would like to commend you for holding this hearing at this critical time.

The League of Women Voters is a nonpartisan, community-based political organization that has worked for 90 years to educate the electorate, register voters and make government at all levels more accessible and responsive to citizens. Organized in more than 850 communities and in every state, the League has more than 150,000 members and supporters nationwide. The League has been a leader in ensuring that democracy works for all citizens and in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

Mr. Chairman, there is one overriding message I hope the Committee will take away from this hearing: With the 2010 elections fast approaching, Congress must pass and send to the President legislation governing corporate and union spending that will take effect immediately.<sup>1</sup> Waiting until after the 2010 elections is simply not a viable option. We urge you to craft legislation so it can be passed by both houses of Congress and be signed by the President by Memorial Day.

The Supreme Court decision in *Citizens United v. FEC* now allows corporations to spend unlimited amounts of money to support or oppose candidates at every level of government. This

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<sup>1</sup> While the issues surrounding corporate and union activity are not always the same, many of the recommendations with regard to corporations may apply to unions as well.

throws out the protections against direct corporate and union spending in elections that have served our democracy for decades. It has given the green light for corporations, including foreign corporations, to intervene directly in elections – from the local school board or zoning commission to Congress and the President of the United States -- taking the power away from voters. And it has set the stage for corruption to skyrocket out of control – now that the Court has allowed unlimited corporate and union expenditures, the power of well-paid lobbyists linked with those interests will greatly increase.

Right now, the stakes are very high. We must act to protect open, honest government and a healthy democracy.

In days since the Court's decision, we have heard from citizens around the country who are deeply concerned about the direction the Court is moving and the effects this case will have on our elections and our government. They want to know what they can do to respond to the decision. Since it is unusual for us to hear from people about a Supreme Court decision, we believe this response shows a broader concern among the public. It reinforces the need for you to act. We have also heard from state Leagues and others asking how they can counteract the decision at the state level since, as you know, the Court's decision invalidates the laws of many states.

The Court's decision in *Citizens United* upends basic campaign finance law. It changes the foundation on which decades of congressional enactments on money in elections are built. Such a fundamental change, with perhaps more coming as the Court considers other cases, requires a strong and considered response from Congress and the Executive. We believe such responses are essential, and we support a wide variety of approaches. But we do not expect that legislation to be adopted this year can address every possible issue. We want to reemphasize that some steps are vital to govern the conduct of the 2010 elections.

Disclosure. After *Citizens United*, we urgently need enhanced disclosure. This is the most basic step toward protecting the role of the voter in making decisions in elections. It now seems possible for corporations, and perhaps unions, to secretly provide funds that another corporation uses to intervene in an election through independent expenditures. This is simply unacceptable. Voters need information about the sources of funding for the charges and countercharges that come during elections. That is one key way that voters test the accuracy of campaign statements and is essential if the "free and open marketplace of ideas" is to function properly. This is especially true in the case of huge expenditures that could drive out other political speech.

The Court pointed in the direction of enhanced disclosure when it said that disclosure is important to "providing the electorate with information." It also supported disclaimer requirements "so that the people will be able to evaluate the arguments to which they are being subjected." We couldn't agree more.

The League of Women Voters supports strong disclosure requirements for both those who receive election funds and those who provide such funds. For example, if corporation A receives significant funds from corporation B, and subsequently makes an election expenditure, then

corporation A should disclose both its own expenditure and the contribution from corporation B, and corporation B should disclose its contribution to corporation A.

Thus a trade association or other corporation that receives funds should have to disclose all the funds going into its treasury if it makes or contributes to election expenditures. And all corporations that provide funds to the trade association or corporation should also have to disclose on their own behalf. The only exception should be if the entity uses a segregated account for these monies. In that case, only the funds provided to the corporation's segregated account would be disclosed, both by the corporation and by the ones providing funds.

The issue of corporate intermediaries is one the Congress should address quickly and fully. It should not be possible for a corporation to avoid disclosure and disclaimers if it provides significant sums to another corporation which then provides funds to a third corporation that makes independent expenditures. We do not believe this type of disclosure should be avoided even if one of the corporations calls such payments a "membership" fee.

Corporations should have the responsibility for providing disclosure to the public through disclaimers and the Internet, directly to their stockholders or members, and to the Federal Election Commission and the Securities and Exchange Commission.

Disclaimers on public communications should be required for every corporation that provides funds above a certain amount directly or indirectly to an election expenditure. The Court clearly approved of disclaimers in *Citizens United*, and remarked that "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

We believe that disclosure should be cumulative so that the public and stockholders can get a full picture of the corporation's entire election activity. In other words, there should be a listing of all candidates, amounts spent in each candidate election, total amounts expended during the reporting period, and amounts and identities for funds provided to others who make election expenditures.

Do No Harm. After providing enhanced disclosure, the next most important step for Congress is to do no further harm. A decision as far-reaching in its implications as *Citizens United* will provoke a number of proposals that, we believe, could make our election system and government processes worse. Some will call for increasing or doing away with contribution limits to candidates. Others will probably support changes in limits on contributions to and from PACs. There will likely be calls to allow corporations and unions once again to make huge contributions to the political parties, effectively repealing the soft money ban in BCRA. There may even be those who call for unlimited corporate and union contributions to candidates.

The League of Women Voters strongly urges you not to do any of these things. We need fair elections, not greater involvement of big money in elections and government. Each of these steps would increase corruption or the appearance of corruption. We are also concerned that they would distort our political processes and undermine shareholder protections, the Supreme Court's rationale in *Citizens United* notwithstanding.



There are a number of other concepts which we support for moving forward in the post-Citizens United context. I would like to mention them, and, in some cases, make a few comments.

Corporate Governance. We support the concept that shareholders should approve election expenditures by corporations, as well as other possible reforms to corporate governance in the campaign finance context. The Court recognized the importance of disclosure to corporate governance, thereby setting the stage for additional shareholder involvement. The Court said, “Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits...”

In large, for-profit corporations, the mechanisms for achieving shareholder approval or disapproval will need special attention because large amounts of stock are held in mutual funds, pension and retirement funds (including government entities) and in other forms that don’t reflect the interests of the underlying owners or beneficiaries. Non-profit corporations, including large ones such as health plans and hospitals, also raise a number of issues. We will look carefully at proposals for enhanced corporate governance.

Foreign Corporations. The Court’s decision in Citizens United clearly opens the door for independent expenditures by foreign corporations in American elections. Indeed the rationale that only *quid pro quo* corruption can justify government limitations on corporate expenditures would obviously apply to foreign corporations. And in disparaging any anti-distortion rationale, the Court seems to undercut limitations based on the identity of the corporation.

Still, we urge Congress to carefully consider blocking election spending by foreign corporations. The obvious example of course is that of the corporation owned by a foreign government. Beyond that, issues arise as to what constitutes a foreign corporation and what form of regulation might be appropriate in each case.

Governments. We believe it is entirely inappropriate for government to intervene in elections. Thus, those corporations that have substantial governmental involvement, particularly financial involvement, should be barred from making independent election expenditures. The Congress will have to address a number of issues in determining which corporations have the requisite involvement. We believe that several approaches might work. Corporations that have received substantial funds (through TARP, for example) or have government guarantees deserve attention. Certainly government pension and insurance funds are another example. We believe that corporations receiving government contracts above a certain level raise issues of excessive government involvement or the potential for corruption.

Connections with Lobbyists. After Citizens United, every member of Congress who receives a visit from a lobbyist for a corporation knows that the corporation can make unlimited expenditures in his or her election. Surely this is a recipe for corruption. The process is corrupted even if the threat is not made or the spending is not carried out. Lawmakers will change their behavior because of the potential for unlimited expenditures. We urge Congress to explore methods to deal with this issue. Surely the anti-corruption rationale should provide a basis for regulation. The problem extends not just to registered lobbyists (after all, the lobby

disclosure laws were designed for disclosure rather than regulatory purposes) but includes the actions of corporate officers and others who control corporate expenditures.

At the same time, we support additional regulation of bundling by lobbyists and increased disclosure of lobbying activities.

Coordination. Though the FEC has yet to develop acceptable anti-coordination rules following enactment of BCRA, it is worth looking at tighter controls to ensure that “independent” expenditures by corporations and unions are truly independent.

Public financing. As a long-time supporter of clean money in elections, the League of Women Voters supports enactment of congressional public financing and repair and updating of the presidential public financing system. Enhanced small contributions through a fair elections system would provide candidates with clean funds, challenging both corruption and the appearance of corruption in our electoral system. We urge Congress to enact such legislation.

Conclusion. The League of Women Voters believes that the Court’s majority decision in *Citizens United v. FEC* was fundamentally wrong and a tragic mistake. The majority mistakenly equated corporate free speech rights with those of natural persons. And the majority confused associations of individuals with corporations. But this is the decision of the Court. Even though we believe it will be overturned eventually, both in the judgment of history and in the law, Congress needs to respond now, recognizing its own authority and responsibility to uphold the Constitution.

Fair and clean elections, determined by the votes of American citizens, should be at the center of our democracy. We urge Congress to act quickly, but also deliberately, in addressing the Court’s decision.

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**Mary G. Wilson, President, League of Women Voters of the United States**

Mary G. Wilson is the 17th president of the League of Women Voters of the United States (LWVUS). During her 20 years of service with the League, Ms. Wilson has held leadership positions at the national, state and local levels, including terms as LWVUS Advocacy Chair and president of the League of Women Voters of New Mexico. Professionally, Ms. Wilson is an attorney with 30 years of experience in diverse fields of practice including estate planning, litigation, regulatory compliance, commercialization and privatization, corporate and environmental law, and employment law. Since 1999, she has been a partner in the law firm Aungier & Wilson, P.C., an estate planning firm that serves clients in New Mexico, Texas and Colorado. She resides in Albuquerque.

The CHAIRMAN. Thank you.  
Ms. Torres-Spelliscy.

**STATEMENT OF CIARA TORRES-SPELLISCY**

Ms. TORRES-SPELLISCY. Good afternoon. Thank you for having me here today.

I request that my report, "Corporate Campaign Spending: Giving Shareholders A Voice," be entered into the record.

The CHAIRMAN. Without objection, so ordered.

Ms. TORRES-SPELLISCY. Thank you.

[The information follows:]

Ms. TORRES-SPELLISCY. We at the Brennan Center encourage Congress to respond to Citizens United in a holistic way. In the near future, corporate managers may be using shareholder money to play in politics. While other witnesses today may argue that nothing has changed because corporate money was already in politics, I would respond that while you may have been wading in special interest money up to your waist at this point, in the future you may be up to your eyeballs or over your head.

Congress should act to ensure that voters and citizens remain the central actors in our elections. We suggest a range of reforms, including public financing, universal voter registration, and empowering shareholders. Today I am going to focus on shareholder empowerment.

Citizens United permits corporate treasury funds to be spent on express advocacy for the first time in 63 years. The crux of the issue is this: When a corporate manager spends "corporate money" on politics, this includes other people's money. There are two basic problems under the current law: a lack of consent and a lack of transparency. This is an important issue, because one out of every two American households is invested in a publicly traded company.

So when I say that shareholders are not sufficiently protected, I am not talking about elites. I am talking about average Americans who rely on their investments for their current income and for their future retirements.

When we were studying this issue at the Brennan Center, we had a chance to ask some big structural questions. One of the questions we asked was, if an investor wanted to know the total amount of political expenditures by a given corporation, would she be able to find that? And the answer in many cases is no. Second, if an investor happened to discover a particularly boneheaded, ill-advised political expenditure, what recourse would that shareholder have? And the answer to that is there is very little legal recourse for a dissenting shareholder.

In asking these big structural questions, we discovered that there are some very problematic gaps between the corporate law and the campaign finance law that leaves shareholders unprotected, and this problem has increased tenfold with Citizens United.

The first problem is a lack of consent, and the big picture is this: Under current law, including the new developments in Citizens United, corporations can spend vast amounts of corporate treasury funds on politics, and they can do so without notifying their shareholders either before or after the fact, and they can do it without getting shareholder consent or authorization.

Then there is the related problem of a lack of transparency. It is extraordinarily difficult for shareholders to learn the total universe of political corporate spending. The short answer to why this is is that neither the Securities and Exchange Commission nor the Federal Election Commission require full disclosure directly to shareholders. So this led us to think about shareholder protections that Congress could enact.

We conclude that legislation should have the following three prongs: Corporate managers should get shareholder authorization of all future political spending; two, companies should provide periodic notice of political spending to shareholders; and any unauthorized corporate political spending should trigger liability. We base this policy proposal in part on the British, who have had these protections for their shareholders since the year 2000.

These reforms make sense from the point of view of the integrity of our capital markets. If a particular company is trying to game the system through political spending, then I think that the market and investors should know that. And these reforms also make good sense from the point of view of our democratic norms because we want consenting individuals at the center of our politics.

I thank you for the opportunity to present today.

[The statement of Ms. Torres-Spelliscy follows:]

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**Testimony of  
Ciara Torres-Spelliscy  
Counsel at the Brennan Center for Justice at NYU School of Law  
before the Committee on House Administration  
U.S. House of Representatives  
February 3, 2010**

**Introduction**

The Brennan Center for Justice at NYU School of Law<sup>1</sup> thanks the Committee for holding this hearing on “The Future of Campaign Finance in an Age of Supreme Court Activism” and for inviting me to testify. To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses four steps to take back our democracy:

- Promote public funding of political campaigns – As the most important single response, we urge the enactment of public funding for congressional and presidential campaigns. The Fair Elections Now Act (FENA) introduced by Rep. Larson would provide multiple matching funds for small contributions, a major step.
- Modernize voter registration – The Brennan Center has proposed improvements to the voter registration system that would add up to 65 million voters to the rolls, while reducing fraud and duplication. To respond to the expected flood of new corporate funds, we must assure that all voters have a chance to cast their ballot.
- Advance a voter-centric view of the First Amendment – The Supreme Court, in *Citizens United*, advanced a novel and radical vision of the First Amendment. They did so with no factual basis and no trial record. (Indeed, the ample trial record in the *McConnell* case persuaded that court to uphold the same restrictions

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Part think-tank, part public interest law firm, part advocacy group, the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change that furthers our democracy. In our work to address the problems of money and politics, we have supported disclosure requirements that inform voters about the potential influences on elected officials, contribution limits that mitigate the real and perceived influence of donors on those officials, and public funding that preserves the significance of the voters’ voices in the political processes. The Brennan Center defends federal, state, and local campaign finance and public finance laws in court and gives legal guidance and support to state and local campaign finance reformers through publications and testimony.

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now so blithely stricken by the Roberts Court.) We urge Congress to build such a factual record through hearings and other investigations.

In today's hearing, we focus on a fourth, critical step: one that directly addresses the phenomenon of corporate managers who wield other people's money as political clubs. We urge Congress to modify securities laws to give shareholders the power to authorize future corporate political expenditures and to require corporations to report past political spending to shareholders on a periodic basis. Attached to this testimony, please find the Brennan Center's recently released policy proposal, *Corporate Campaign Spending: Giving Shareholders a Voice*, which explores these topics in more depth. Such an approach has been the law in Great Britain since 2000.

**The Policy Solution in Brief**

We conclude there should be three prongs to Congressional legislation that protects shareholder interests after *Citizens United*: (1) corporate managers should get authorization of future political spending; (2) corporate managers should provide periodic notice of political spending from the company to the shareholders; and (3) any unauthorized corporate political spending should trigger liability.

Below, I will outline the problems created by *Citizens United*. Then I will articulate the Brennan Center's policy proposal and will explain why existing laws are insufficient. Finally, I will answer common questions about the policy proposal.

**What's Wrong with Corporate Political Spending?**

Corporate political spending presents risks to both American democracy and to American shareholders. Investing has expanded markedly over the past few decades, to the point where nearly one in two American households owns stocks, many through mutual funds or 401(k) retirement accounts.<sup>2</sup> After the Supreme Court's decision in *Citizens United*, corporations will be able to spend the capital generated through such investments in federal and state elections for the first time in decades. This new license raises two questions: Should shareholders have a say on whether their money should be used for political purposes? And should shareholders be informed of the use of their investments for political purposes?

American shareholders currently lack the ability to object or consent to political spending by American corporations. Indeed, because of gaps between corporate and campaign finance law, U.S. corporations can make political expenditures without giving shareholders any notice of the spending either before or after the fact. As beneficial

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<sup>2</sup> See JOINT ECONOMIC COMMITTEE, 106<sup>TH</sup> CONG., THE ROOTS OF BROADENED STOCK OWNERSHIP 1 (2000), [www.house.gov/jec/tax/stock/stock.pdf](http://www.house.gov/jec/tax/stock/stock.pdf); Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, 2 (2005), <http://www.ici.org/pdf/fm-v14n5.pdf>; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), [http://www.ici/factbook.org/pdf/2009\\_factbook.pdf](http://www.ici/factbook.org/pdf/2009_factbook.pdf) (noting "[h]ouseholds are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households' financial assets at year-end 2008.").

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owners of corporations, investors should be given the opportunity to approve corporate political spending through a shareholder vote.

Until *Citizens United*, a century's worth of American election laws prohibited corporate managers from spending a corporation's general treasury funds in federal elections.<sup>3</sup> Pre-existing laws required corporate managers to make political expenditures via separate segregated funds (SSFs), which are also commonly known as corporate political action committees (PACs), so that shareholders, officers and managers who wanted the corporation to advance a political agenda could designate funds for that particular purpose.<sup>4</sup>

These laws protected both shareholders and the integrity of the democratic process. Recognizing the wisdom of this approach, many states followed suit with similar laws. In the 28 states that lack federal-style election rules, however, corporations made political donations directly from their corporate treasuries, including high cost states like New York, California and Illinois, where political campaigns can cost millions of dollars. This money paid for legislative, executive and judicial elections without consent from or notice to shareholders.<sup>5</sup>

It is hard to overstate what a paradigm shift *Citizens United* has caused for both American democracy and American shareholders. *Citizens United* stuck down decades-old restrictions on the use of general treasury funds to directly support or opposed candidates. Now corporate managers are free to spend corporate treasury funds in Presidential, Congressional and over 20 additional state elections.<sup>6</sup> This will greatly

<sup>3</sup> Until *Citizens United*, the Federal Elections Campaign Act (FECA) prohibited corporations (profit or nonprofit), labor organizations and incorporated membership organizations from making direct contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b. The limits have a long vintage. For 63 years, since Taft-Hartley, corporation have been banned from spending corporate treasury money to expressly support or oppose a federal candidate and for 103 years, since the Tillman Act, corporations have been banned from giving contributions directly from corporate treasury funds to federal candidates. After *Citizens United*, corporations are still banned from direct contributions in federal elections.

<sup>4</sup> 11 C.F.R. 100.6; FED. ELECTION COMM'N, SSFs AND NONCONNECTED PACs (May 2008), <http://www.fec.gov/pages/brochures/ssfnonconnected.shtml>.

<sup>5</sup> Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELEC. L.J. 361, 361 (2004) (arguing "treasury funds reflect the economically motivated decisions of investors or members who do not necessarily approve of the political expenditures, while segregated funds—such as a political action committee (PAC)—raise and spend money from knowing, voluntary political contributors."); see *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (explaining "the [corporate treasury spending] ban has always done further duty in protecting 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed'" (internal citations omitted)).

<sup>6</sup> ALASKA STAT. § 15.13.074(f); ARIZ. CONST. ART. XIV, § 18; ARIZ. REV. STAT. §§ 16-919(A), -920; COLO. CONST. XXVIII, § 3(4)(a); CONN. GEN. STAT. § 9-613(a); IOWA CODE § 68A.503; KY. REV. STAT. § 121.150(20); MASS. GEN. L. CH. 55, § 8; MICH. C. L. S. § 169.254(1); MINN. STAT. § 211B.15; MONT. CODE ANN. § 13-35-227; N.C. GEN. STAT. §§ 163-278.15, -278.19; N.D. CENT. CODE § 16.1-08.1-03.3; OHIO REV. CODE ANN. § 3599.03(A)(1); OKLA. STAT. TIT. 21, § 187.2 CH. 62, APPX., 257: 10-1-2(d); 25 PA. STAT. § 3253(a); R.I. GEN. LAWS § 17-25-10.1(h), (j); S.D. CODIFIED LAWS § 12-27-18 2a; TENN. CODE ANN. § 2-19-132; TEX. ELEC. CODE § 253.094; W. VA. CODE § 3-8-8; WIS. STAT. § 11.38; WYO. STAT. § 22-25-102(a).



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amplify special interests at the expense of American democracy, putting both our economy and shareholders at risk.

Even before *Citizens United*, many corporate managers had a history of spending corporate funds on politics. For example, when federal soft money was legal, corporate managers would often give significant sums to political parties directly out of the corporate treasury.<sup>7</sup> They spent this corporate money without shareholder authorization or any notice to shareholders either before or after the fact. *Citizens United* did not disturb the federal soft-money ban; however, a pending federal case, *RNC v. FEC*, seeks to do exactly that. But an even more troubling frontier of corporate political spending has been opened up by the decision—that of unlimited corporate political independent expenditures and electioneering communications.

### What Are the Specific Risks of Corporate Political Spending?

Unchecked corporate political spending threatens democracy. The risk to democracy is that corporate political spending will attempt to buy policies which are antithetical to the common good, instead benefiting only the company or industry that purchased political advertisements. Professor Daniel Greenwood has outlined this democratic problem:

When the pot of [corporate] money enters the political system, it distorts the very regulatory pattern that ensures its own utility. When the pot of money is allowed to influence the rules by which it grows, it will grow faster, thus increasing its ability to influence—setting up a negative feedback cycle and assuring that the political system will be distorted to allow corporations to evade the rules that make them good for all of us (to extract rents, in the economists' jargon).<sup>8</sup>

In addition, at least two key shareholder rights are implicated by corporate political spending. First, shareholders have a right to a fair return on their investment. This is a classic example of what Supreme Court Justice Louis Brandeis called the potential misuse of “other people’s money.”<sup>9</sup> The U.S. Solicitor General dryly noted, “[Founding Father] John Hancock pledged his own fortune; when the CEO of John Hancock Financial uses corporate-treasury funds for electoral advertising, he pledges someone else’s.”<sup>10</sup> Since shareholder money is at stake, shareholders deserve more say about whether that money is spent on political contributions and expenditures.

<sup>7</sup> Center for Responsive Politics, *Soft Money Backgrounder* (undated), <http://www.opensecrets.org/parties/softsource.php> (showing soft money from corporations and unions combined between 1992 and 2002 totaled over a \$1 billion); Supplemental Brief of the Committee for Economic Development as Amicus Curiae in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 5 (2009) (“By the 2000 election cycle, corporate soft money contributions totaled 48% of all soft money receipts and often were given in sums of \$100,000 or more by large companies.”) (citing Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 112-18* (Michael J. Malbin ed., 2006)).

<sup>8</sup> Daniel Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 1054 (1998), <http://ssrn.com/abstract=794785> (in sum, arguing that “corporations, not being citizens, cannot be legitimate political actors”).

<sup>9</sup> LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT* (1914).

<sup>10</sup> Supplemental Reply Brief for Appellee, *Citizens United v. FEC*, No. 08-205 at 7 (2009).

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Second, shareholders have a First Amendment right to remain silent in a political debate or to support a candidate of his or her choosing. These are at risk when a manager uses corporate money to support political causes which are antithetical to a given shareholder's wishes. Senators McCain and Feingold and Former Representatives Shays and Meehan, the Congressional sponsors of the Bipartisan Campaign Reform Act (BCRA), recognized that shareholders' First Amendment rights were at risk in *Citizens United*:

The tremendous resources business corporations and unions can bring to bear on elections, and the greater magnitude of the resulting apparent corruption, amply justify treating corporate and union expenditures differently from those by individuals and ideological nonprofit groups. So, too, does the countervailing free-speech interest of the many shareholders who may not wish to support corporate electioneering but have no effective means of controlling what corporations do with what is ultimately the shareholders' money.<sup>11</sup>

Now, corporate managers may trample on shareholders' free speech and associational rights by making them unwittingly subsidize speech that they do not support ideologically.

**How did *Citizens United* Affect Shareholder Rights?**

*Citizens United* poses a policy question: should Congress protect shareholders from corporate managers' spending corporate treasury funds on politics? Writing for the 5-4 majority, Justice Anthony M. Kennedy argued that shareholders do not need Congress to protect them from corporate political spending through campaign finance laws because they can protect themselves using corporate governance tools.<sup>12</sup> Although, Justice Kennedy asserts this as a fact, there was an incomplete factual record before the Court. Perhaps, with a full factual record, Justice Kennedy would have agreed that shareholder rights are sharply circumscribed under current state law.

According to Justice Kennedy, the free flow of information empowers shareholders to protect their own interests. As he wrote, "[s]hareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative."<sup>13</sup> His vision, however is not grounded in reality. In fact, corporate political spending is far from transparent.

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<sup>11</sup> Supplemental Brief of Amici Curiae Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 2 (2009).

<sup>12</sup> *Citizens United v. FEC*, slip opinion at 46 (arguing there is "little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.").

<sup>13</sup> *Id.* at 55.

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While 48 corporations in the S&P 100 have decided to voluntarily disclose their political spending,<sup>14</sup> the vast majority of publicly traded companies keep their political activities in the dark and no corporate law requires them to do otherwise. While it is laudable that so many top companies are embracing transparency, there are over 3,900 companies listed on the New York Stock Exchange alone.<sup>15</sup> The fact that a few dozen companies are being transparent does not change the state of play for the average stockholder. Furthermore, because these companies are doing this disclosure voluntarily, they can rescind these good practices and revert to more secretive ways of doing business at any moment. Also, there is no indication that any corporation voluntarily gives its shareholders a vote over corporate political spending.

Justice Kennedy's second mistaken assumption is that shareholders who discovered a large or imprudent corporate political expenditure could actually do anything about it.<sup>16</sup> Unfortunately, state-based corporate law gives shareholders little recourse. A suit for breach of fiduciary duties or a waste of corporate assets is likely to be in vain; and attempts to oust the board that oversaw the spending would likely fail. Although shareholders can sell their shares, it could be at a loss. Genuine protections require Congressional action.

Justice Kennedy is correct that knowledge of corporate political spending will help shareholders and voters alike make informed decisions. The world he pictured in *Citizens United* of transparent corporate expenditures does not exist presently, but it should. Consequently, Congress should change the securities laws to require corporations to grant them the power to authorize future expenditures and inform shareholders about past political spending.

**Why Don't Shareholders Know About Corporate Political Donations?**

The short answer to why shareholders have so little information about corporate political spending is that neither the Federal Elections Commission (FEC) nor the Securities and Exchange Commission (SEC) requires corporations to disclose political spending directly to their shareholders. Publicly traded corporations are governed by securities laws,<sup>17</sup> which require detailed public reporting of many aspects of organizational structure and financial status. Political contributions are not one of the categories of required reporting.

<sup>14</sup> Press Release, Center for Political Accountability, *New Companies Bring Political Disclosure to Nearly Half of Trendsetting S&P 100*, <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/2636>.

<sup>15</sup> New York Stock Exchange, *Listings Directory* (2009), [http://www.nyse.com/about/listed/lc\\_all\\_overview.html](http://www.nyse.com/about/listed/lc_all_overview.html) (noting 3908 US companies are listed on the NYSE) (last visited Feb. 1, 2010).

<sup>16</sup> *Citizens United v. FEC*, slip opinion at 55 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits.").

<sup>17</sup> The laws governing publicly traded companies include the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Sarbanes-Oxley Act of 2002. See SEC, *The Laws That Govern the Securities Industry*, <http://www.sec.gov/about/laws.shtml>.

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Campaign finance disclosure law varies state to state and often fails to capture modern political spending. For example, independent expenditures—the very type of political expenditures unleashed by *Citizens United*—are underreported in most states. One study found that a mere five states make information about independent expenditures readily available to the public. As this report noted, “holes in the laws—combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws—results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public.”<sup>18</sup>

Even for the political spending that is properly reported to a government agency, there is no duty to share this information directly with shareholders in an accessible way. Because political spending by corporate entities is not disclosed in a single place like a Form 10-K filed with the SEC, discovering the full extent of the political spending of any corporate entity takes copious research. This basic asymmetry of information needs to be addressed by changing federal securities laws to better inform shareholders.

Thus, disclosure of corporate political expenditures presently falls into a gap between corporate and campaign finance law.<sup>19</sup> Consequently, shareholders often know very little about the beneficiaries of corporate political expenditures,<sup>20</sup> and they may unwittingly fund political spending at odds with their political philosophies.<sup>21</sup> As Professor Jill Fisch has explained:

Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation’s internal controls. The lack of oversight makes it difficult for corporate decision makers and stakeholders to evaluate the costs and benefits of political activity.<sup>22</sup>

With even governing boards in the dark about corporate political spending, shareholders have little hope of fully understanding the scope of companies’ political expenditures.<sup>23</sup>

<sup>18</sup> LINDA KING, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (Aug. 1, 2007), <https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1>.

<sup>19</sup> Victor Brudney, *Business Corporations and Stockholders’ Rights under the First Amendment*, 91 YALE L. J. 235, 237 (1981) (stating “[t]he use of that wealth and power by corporate management to move government toward goals that management favors—with little or no formal consultation with investors—is also a phenomenon that is generally undeniable.”).

<sup>20</sup> Bruce F. Freed & John C. Richardson, *Company Political Activity Requires Director Oversight*, ALI-ABA COURSE OF STUDY MATERIALS, 478 (Dec. 2005).

<sup>21</sup> *Id.* at 480; *see also* Brudney, *supra* note 19, at 239-40 (noting “unless investor approval is obtained, the funds of some investors are being used to support views they do not favor.”).

<sup>22</sup> Jill Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006).

<sup>23</sup> The lack of board approval is the norm. However two states (Louisiana and Missouri) do require board approval of political donations before they are made. *See* La. Rev. Stat. Ann. §18:1505.2(F) (also allowing officers of the corporation to make such contributions if empowered to do so by the board of directors); Mo. Ann. Stat. §130.029.

### Why Aren't Shareholders Protected by a Corporation's Structure?

The more complex answer to why corporations have not traditionally sought consent for political spending nor disclosed such spending to shareholders lies in the very structure of the way corporations are organized and the very magnitude of many modern corporations. At first blush, many principles of corporate law appear to favor disclosure of political spending as a basic part of overall transparency, a lynchpin of good corporate governance.<sup>24</sup> But the structure of corporations makes shareholder input unlikely.

Shareholders own a corporation by holding a transferable share interest, but do not manage the corporation day-to-day.<sup>25</sup> The default management structure of a corporation is that the shareholders elect a board of directors.<sup>26</sup> The board delegates business decisions to the officers, who are vested with day-to-day management of the business and affairs of the corporation.<sup>27</sup> The distinction between ownership and control ideally works to reduce the costs of corporate decision making by placing control over most corporate affairs in the hands of elected directors and appointed officers who are better informed than shareholders about the business of the corporation.<sup>28</sup> Conversely, this structure inhibits shareholders from changing or controlling corporate political spending, or even requesting that the spending be disclosed in a particular manner.<sup>29</sup>

Professor Thomas Joo has rightly noted the Supreme Court's misunderstanding of corporate structure and its confusion concerning the breadth of shareholder controls:

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<sup>24</sup> For example, Sarbanes-Oxley imposes increased disclosure and reporting requirements, creates stricter rules concerning the independence of the accounting firms working for publicly traded companies and imposes additional responsibilities on the directors and officers of public companies. See *Excellence in Corporate Governance Online*, Legal Issues, <http://www.corpgovonline.com/Content/LegalIssues.html>; J. Brent Wilkins, *The Sarbanes-Oxley Act of 2002: The Ripple Effects of Restoring Shareholder Confidence*, 29 S. ILL. U. L. J. 339, 349 (2005); Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1, 3 (2007).

<sup>25</sup> WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 96 (2003).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 100.

<sup>28</sup> *Id.*; see also *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919) (holding "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

<sup>29</sup> The division of ownership and day-to-day management largely collapses in the case of a closely-corporation. A close corporation is often defined simply as one with few shareholders, whose shares are not traded in securities markets. The small number of shareholders means that management and ownership are frequently concentrated in the same hands. See JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, FORMS OF BUSINESS ASSOCIATION: DEFINITIONS AND DISTINCTIONS § 1.20 (2002); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L. Q. 1, 109 (2001) ("[E]lection-related spending may in fact constitute shareholder expression in some corporations, such as a corporation owned by a single person, or a closely held corporation actively managed by its shareholders. Those shareholders do not require state protection from management abuses.").

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Dissenting in *Austin*, Justice Scalia dismissed the idea that shareholders might justifiably object to management political speech. According to Justice Scalia, every shareholder “knows that management may take any action that is ultimately in accord with the majority (or a specified supermajority) of the shareholders’ wishes, so long as that action is designed to make a profit. That is the deal.” This passage suggests that shareholders are entitled to vote on corporate actions, but that is most emphatically *not* the deal with respect to a corporation’s election-related spending.<sup>30</sup>

Accordingly, most shareholders have zero say about the corporation’s political spending. The ability to transfer shares on the open market in publicly traded companies could potentially work to restrain self-serving behavior of corporate managers.<sup>31</sup> But the sale of shares does not give shareholders a way to signal to the managers that it was motivated by the corporation’s political spending. Moreover, because nearly all publicly traded corporations tend to be similarly situated *vis a vis* their treatment of political donations, the shareholder has no way of buying shares that give them a greater amount of control over corporate political spending. So long as shareholders invest in American companies, they risk that part of their investment may be used for a political purpose.<sup>32</sup>

### Doesn’t a Corporation Owe Fiduciary Duties to Shareholders?

Directors and officers owe fiduciary duties to the corporation and its shareholders.<sup>33</sup> There are three fiduciary duties: obedience, loyalty, and care. The duty of care is the broadest of the fiduciary duties, reaching all aspects of conduct,<sup>34</sup> and encompassing a duty to not waste assets. Theoretically, if corporate political spending were incredibly high, this could be deemed a waste of corporate assets and violation of the fiduciary duty of care. Courts and regulators, however, have not traditionally construed these duties to restrain political spending.

Claims that an action like spending corporate funds on political advertisements constitutes a waste of corporate assets or a breach of a fiduciary duty are likely to be thwarted by the business judgment rule, a judicially created principle that is extremely deferential towards the decisions of directors and officers.<sup>35</sup> The business judgment rule

<sup>30</sup> Joo, *The Modern Corporation*, *supra* note 29, at 42-43.

<sup>31</sup> *Id.* at 95.

<sup>32</sup> The only way to buy shares in a company that gives shareholders more rights over corporate political spending is by investing in an American company which is subject to the British Companies Act of 2006. Companies Act, c. 46, §§ 369, 374 (2006), [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga\\_20060046\\_en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf).

<sup>33</sup> ALLEN & KRAAKMAN, *supra* note 25, at 31; a fiduciary relationship is one “founded on trust or confidence reposed by one person in the integrity and fidelity of another.” *See* BLACK’S LAW DICTIONARY (7th ed. 1999).

<sup>34</sup> ALLEN & KRAAKMAN, *supra* note 25, at 240. The classic formulation of this duty requires a corporate director or officer to perform his or her functions (1) in good faith, (2) in a manner that he or she reasonably believes to be in the best interests of the corporation, and (3) with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances. *See* ALI, PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (1994).

<sup>35</sup> ALLEN & KRAAKMAN, *supra* note 25, at 252.

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holds that a decision constitutes a valid business judgment if it is (1) made by financially disinterested directors or officers, (2) who have become duly informed before exercising judgment, and (3) who exercise judgment in a good faith effort to advance corporate interests.<sup>36</sup> Courts have traditionally been very hesitant to apply the label of bad faith to decisions made by officers and directors unless they are clearly extreme and irrational,<sup>37</sup> and thus, courts have been overwhelmingly reluctant to intervene in such decisions.<sup>38</sup>

For instance, in *Cort v. Ash*,<sup>39</sup> the Supreme Court held that there was no private right of action for shareholders to peruse derivative suits against corporations for violations of the Federal Elections Campaign Act (FECA)'s ban on the use of corporate treasury funds in federal elections thereby effectively stripping shareholders of any ability to enforce this important federal law.<sup>40</sup> In the same year, shareholders brought suit in California specifically claiming that a corporate political contribution to a ballot measure campaign was an improper use of corporate funds.<sup>41</sup> The court rejected the shareholders' claims by specifically characterizing a corporate political contribution as a good faith business decision under the business judgment rule, even though there was no clear connection between the contribution and the corporation's business.<sup>42</sup> The court found no restriction in either the corporation's articles of incorporation or state law regarding such a contribution and therefore found no problem with the corporation's political spending.<sup>43</sup>

Professor Thomas Joo elucidates:

Shareholders must allege corruption or conduct approaching recklessness in order to even state a claim challenging management actions. This principle of deference is not limited to decisions regarding 'business,' narrowly defined. Courts have applied business judgment deference to...political spending on the ground that management may believe such decisions will indirectly advance the corporation's business.<sup>44</sup>

In sum, courts essentially presume that managers' business decisions are made in good faith and defer to all but the most egregiously negligent or irrational management decisions.<sup>45</sup> Thus, suits challenging political spending would be unlikely to prevail.

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<sup>36</sup> *Id.* at 251.

<sup>37</sup> *Id.* at 252.

<sup>38</sup> *Id.* at 288-90.

<sup>39</sup> 422 U.S. 66 (1975).

<sup>40</sup> Adam Winkler, 'Other People's Money': Corporations, Agency Costs, and Campaign Finance Law, 92 GEORGETOWN L.J. 871, 872 (Jun. 2004).

<sup>41</sup> *Marsili v. Pacific Gas & Elec. Co.*, 51 Cal. App. 3d 313, 322 (Cal. Ct. App. 1975).

<sup>42</sup> *Id.* at 313.

<sup>43</sup> *Id.* at 324; but compare *McConnell v. Combination Mining & Milling Co.*, 76 Pac. 194, 198 (Mont. 1904) (finding corporate political contributions to be *ultra vires*. "The [political] donation[s]...were clearly outside the purpose for which the corporation was created, both being for strictly political purposes.").

<sup>44</sup> Thomas W. Joo, *People of Color, Women, and the Public Corporation: Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 959 (2005) (citation omitted).

<sup>45</sup> Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L.J. 361, 368 (2002).

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**Why Can't the Market Solve this Problem?**

Critics of interventions on the shareholder's behalf, like Justices Kennedy, Roberts and Scalia, may argue that the ability to sell shares on the open market solves this problem. But market discipline is not a good enough deterrent and this problem is not self-correcting. As Professor Thomas Joo has explained, the ability to sell shares<sup>46</sup> is actually no remedy at all for the harm of wasting corporate funds on politics:

[T]he 'Wall Street Rule' teaches that if a shareholder disagrees with management, it is more efficient for her to sell her stock than to attempt to change management....[E]ven if the shareholder learns of objectionable election-related spending, 'voting with her feet' allows the shareholder only to escape *continued* unauthorized use of the corporate resources. It does not put a stop to the activity or provide any remedy for unauthorized use that has already occurred. Moreover, selling shares because of the corporation's election-related spending is unlikely to have a disciplining effect on management.<sup>47</sup>

Once the money is out the door, in the hands of campaign or political consultant, then the corporation cannot retrieve that money. Selling the shares does not make the corporation or the shareholder whole again.

**How Should U.S. Securities Law be Reformed?**

The U.S. should modify its securities laws to address corporate political expenditures post-*Citizens United* by (1) mandating that corporations obtain the consent of shareholders before making political expenditures, (2) requiring disclosure of political spending directly to shareholders and (3) holding corporate directors personally liable for violations of these policies. This approach will empower shareholders to affect how their money is spent. It also may preserve more corporate assets by limiting the spending of corporate money on political expenditures.

Shareholder consent is a key reform. Congress should act to protect shareholders by giving them the power, under statute, to authorize political spending by corporations. The voting mechanics would work in the following way. At the annual general meeting of shareholders, a corporation that wishes to make political expenditures in the coming year should propose a resolution on political spending which articulates how much the

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<sup>46</sup> Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 INDIANA L.J. 1259, 1262 n.11 (Fall 2009) ("Shareholders also have the right to sell their shares. This so-called exit right has been viewed by some as particularly important because it facilitates the market for corporate control by enabling the displacement of poorly performing managers.... However, scholars have pointed out that the market for corporate control is imperfect.... noting that even when shareholders sell their shares and attendant voting rights, management often remains in power.") (internal citations omitted).

<sup>47</sup> Joo, *The Modern Corporation*, *supra* note 29, at 57-58; *see also id.* at 67-68 ("The law should communicate society's disapproval of the mercenary view by rejecting the presumption that shareholders always value wealth above their political preferences.") (citation omitted).



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company wishes to spend on politics.<sup>48</sup> If the resolution gains the vote of the majority of the outstanding shares (50% plus 1 share), then the resolution will be effective, and the company will be able to spend corporate treasury funds on political matters in the amount specified in the resolution. However, if the vote fails to garner the necessary majority, then the corporate must refrain from political spending until the shareholders affirmatively vote in favor of a political budget for the company.

Finally, to make sure this reform is enforceable, directors of U.S. companies who make unauthorized political expenditures using company funds, should be personally liable to the company for the unauthorized amount.

Our support for this model is grounded in a sensitivity to administration and transaction costs. A system which put every political action of a corporation to a vote would be costly and unwieldy to administer. By contrast, under this proposal, the corporation can simply add an additional question (on authorization of the political budget) to the list of items which are regularly subject to a shareholder vote at the annual meeting, alongside traditional matters such as the election of the board of directors or appointing auditors.

The disclosure of corporate political spending is under current campaign finance and securities law is inconsistent, keeping shareholders in the dark about whether their investment money is being used in politics. Therefore, Congress should require corporations to disclose their political spending, as many top firms have already agreed to do voluntarily at the urging of the Center for Political Accountability.<sup>49</sup>

To be useful, disclosure of political spending under this proposal should be frequent enough to notify shareholders and the investing public of corporate spending habits and yet with enough time lag between reports so that corporations are not unduly burdened. To accommodate these two competing goals, disclosure of political expenditures should occur quarterly to coincide with company's filing of its Form 10-Qs with SEC. Because the political disclosure will be contemporaneous with the 10-Q filing, transaction costs can be minimized.

In summary, to improve American corporate governance, the U.S. should change its securities laws and should require publicly traded companies to (1) get shareholders' authorization before spending corporate treasury funds on politics and (2) report their political spending directly to their shareholders on a periodic basis. In addition, (3) any unauthorized political spending should result in personal liability for directors.

### **Does Congress Have the Authority to Act under the Commerce Clause?**

Congress has the full authority to legislate in the corporate governance sphere of publicly traded companies using its Commerce Clause power. The recent experience with Sarbanes-Oxley proves this. Just as Sarbanes-Oxley regulated the independence of

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<sup>48</sup> If particular candidates or ballot measures are known to the company at the time of the annual general meeting, then those particular candidates and ballot measures should be mentioned in the language of the resolution.

<sup>49</sup> Press Release, Center for Political Accountability, *supra* note 16.

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boards and other matters which were traditionally state-law matters and was not barred by federalism concerns, the legislative proposal articulated here would also not be barred. Legal commentators agree that Congress has broad powers to regulate corporate governance and any objections to “federalization” are purely normative. As Professor Stephen M. Bainbridge<sup>50</sup> notes:

No one seriously doubts that Congress has the power under the Commerce Clause, especially as it is interpreted these days, to create a federal law of corporations if it chooses.<sup>51</sup>

Or as Professor Robert B. Ahdieh<sup>52</sup> put it, “[n]o line of sufficient impermeability to categorically exclude any and all possible federal interventions into corporate law can be identified.”<sup>53</sup>

When the Sarbanes-Oxley bill was debated by Congress, few legislators raised concerns about the bill’s constitutionality on the record, perhaps due to its quick passage.<sup>54</sup> Representative Ron Paul is the only congressional voice that raised any specter of constitutional challenge in record.<sup>55</sup> While chiefly objecting to the expansion of “federal power over the accounting profession,” as it “preempt[ed] the market’s ability to come up with creative ways to hold corporate officials accountable,” Rep. Paul also argued that the bill, “interfere[d] in matters the 10th amendment reserves to state and local law enforcement.”<sup>56</sup> Despite Rep. Paul’s predictions, thus far no plaintiff has tried to assert a purely federalism claim against the enforcement of Sarbanes-Oxley.<sup>57</sup>

<sup>50</sup> Stephen M. Bainbridge is a Professor of Law at UCLA School of Law.

<sup>51</sup> Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REGULATION, 26 (Spring 2003), available at <http://ssrn.com/abstract=389403>; see also Harvard Law Professor Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 592 (2003) (“Federal authorities reverse state corporate law that they dislike and leave standing laws that they tolerate. State power is to jigger the rules in the middle by adopting those rules that Washington does not gear up to reverse....”).

<sup>52</sup> Professor of Law and Director, Center on Federalism and Intersystemic Governance, Emory Law School.

<sup>53</sup> Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes Oxley*, 53 BUFF. L. REV. 721, 731 (2005).

<sup>54</sup> See Ahdieh at 724 (“The brief congressional debate over the Sarbanes-Oxley Act only cursorily addressed issues of corporate governance.”). See also Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1549-1556 (2005) (discussing the lack of debate in both chambers).

<sup>55</sup> See H.R. REP. NO. 107-414 (statement of Ron Paul).

<sup>56</sup> *Id.*

<sup>57</sup> In one case challenging Sarbanes-Oxley, the defendant health insurance company executive raised an unsuccessful vagueness challenge to the criminal penalties in 18 U.S.C.S. § 1350, which penalizes executives who “willfully certify[]” a periodic financial report knowing that the report does not comply with the Act’s requirements. See *United States v. Sernsby*, 2004 U.S. Dist. LEXIS 23820 (N.D. Ala. Nov. 23, 2004). In the second case, the plaintiffs brought a facial challenge to the constitutionality Public Company Accounting Oversight Board, created by Sarbanes-Oxley but classified as a non-profit rather than a governmental agency, see 15 U.S.C.S. 7211(b), as a violation of the Appointments Clause and the separation of powers. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008). The challenge was rejected by both the district and appellate courts and is currently before the U.S. Supreme Court. See *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 129 S. Ct. 2378 (2009) (granting certiorari).

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It is fully appropriate for Congress to respond to *Citizens United* through the securities laws. In previous democratic crises caused by corporate political spending, Congress has responded with the twin tools of campaign finance regulations as well as revised corporate laws. For example, following the revelations of corporate political spending in the Watergate hearings, Congress reacted by both (1) revising the Federal Elections Campaign Act to make it more robust as well as (2) passing the Foreign Corrupt Practices Act, which makes it a federal crime for U.S. companies to give contributions to candidates in foreign countries if such contributions are meant to secure business or are stand-ins for bribes. Similarly, after Enron collapsed following years of giving lavishly to both sides of the political spectrum, Congress acted by passing both (1) the Bipartisan Campaign Reform Act of 2002 (BCRA which is also known as McCain-Feingold) and (2) Public Company Accounting Reform and Investor Protection Act of 2002 (which is also known as Sarbanes-Oxley). Now that *Citizens United* has severely limited Congress' ability to regulate corporate political spending through the campaign finance laws, the securities laws remain an open avenue to enact thoughtful protections for the American public and the American investor.

**Do Shareholders Even Care about this Issue?**

Some may argue that shareholders either do not really care about corporate political spending or that they may be ill-equipped to judge the political spending by corporate managers. However, as Professor Joo explains, this view is contrary to American democratic norms:

[T]he extension of business judgment discretion to political decisions expresses norms inconsistent with our self-governing polity. Most shareholders presumably have neither expertise nor interest in making the corporation's routine business decisions....But to presume that shareholders have neither expertise nor interest in matters involving political preference contradicts the basic assumptions of self-government and thereby perverts the meaning of the First Amendment.<sup>58</sup>

For those who do care about their investments being funneled into the political system, the current U.S. system offers no redress, save selling all stock holdings. As discussed above, this "solution" offers little redress at all.

A recent survey of shareholders found that shareholders do care about corporate political spending and want greater disclosure.<sup>59</sup> Shareholders have demonstrated their interest in disclosure of corporate political activity by filing shareholder resolutions requesting more corporate transparency on this very topic. As the Committee for

<sup>58</sup> Joo, *The Modern Corporation*, *supra* note 29, at 72 (citation omitted).

<sup>59</sup> Press Release, Center for Political Accountability, *Shareholders See Risky Corporate Political Behavior As Threat to Shareholder Value, Demand Reform, CPA Poll Finds*, (Apr. 5, 2006), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267> (announcing a "poll found a striking 85 percent [of shareholders] agreed that the 'lack of transparency and oversight in corporate political activity encourages behavior' that threatens shareholder value. 94 percent supported disclosure and 84 percent backed board oversight and approval of 'all direct and indirect [company] political spending.'").

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Economic Development (CED) reports, disclosure of political expenditures has become the second most popular shareholder resolution.

After climate change, the leading category of social issue proposals filed by shareholders in 2007 dealt with political contributions, according to an analysis by the governance rating firm RiskMetrics. Proposals on political contributions usually ask companies to issue semi-annual reports on political contributions and to provide guidelines for making contributions.<sup>60</sup>

In the past few years, there have been numerous shareholder resolutions requesting the disclosure of political expenditures by corporations. In 2006 such resolutions gained the support of 20% or more of the vote at 11 major companies, including Citigroup (20%), American Financial Group (20.5%), Clear Channel Communications (20.5%), General Dynamics (21%), Washington Mutual (22%), Wyeth (25.2%), Charles Schwab (27%), Marsh and McLennan (30.5%), Verizon (33%) and Home Depot (34%).<sup>61</sup> At Amgen, a political expenditure disclosure resolution received 75.5% of the vote following endorsement by the company's directors.<sup>62</sup> At least 56 disclosure resolutions were filed during the 2009 proxy season, including at major financial institutions such as Charles Schwab, Goldman Sachs, JPMorgan Chase, Regions Financial and Wells Fargo.<sup>63</sup> Such resolutions have been strongly supported by major institutional investors, including the New York City pension fund.<sup>64</sup> In 2008, the proxy voting advisory service RiskMetrics Group supported a disclosure resolution calling on AT&T to disclose its political spending, after opposing a similar resolution at AT&T the three previous proxy seasons.<sup>65</sup> For example, a typical resolution requests periodic disclosure of political expenditures including payments to trade associations and other tax exempt organizations.<sup>66</sup>

These shareholder sentiments have greater urgency after the *Citizens United* decision, and many papers across the nation have written editorials calling for Congressional action to protect the interests of shareholders. *The New York Times* urged:

<sup>60</sup> Committee for Economic Development, *Rebuilding Corporate Leadership: How Directors Can Link Long-Term Performance with Public Goals* 18 (2009), [http://www.ced.org/images/library/reports/corporate\\_governance/cgpt3.pdf](http://www.ced.org/images/library/reports/corporate_governance/cgpt3.pdf) (citing Carolyn Mathiasen, "2008 Preview: Social Issues," *RiskMetrics Risk & Governance Blog* (Mar. 28, 2008), [http://blog.riskmetnics.com/2008/03/2008\\_preview\\_social\\_issuessubm.html](http://blog.riskmetnics.com/2008/03/2008_preview_social_issuessubm.html)).

<sup>61</sup> Timothy Smith and Bruce Freed, *Social Investment—Highlights from 2006 Proxy Season*, GreenMoneyJournal.com, Oct. 10, 2006, available at <http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/373>.

<sup>62</sup> *Id.*

<sup>63</sup> Jeanne Cummings, *Companies Try to Clean Up Their Act*, Politico, Mar. 24, 2009, <http://www.politico.com/news/stories/0309/20401.html>.

<sup>64</sup> Francesco Guerrera, *Investors Want Facts on Political Donations*, Financial Times, Apr. 1, 2007, available at <http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/532>.

<sup>65</sup> *Key Proxy Advisor Recommends Vote Against AT&T Management on Political Contributions Disclosure*, Center for Political Accountability, Apr. 21, 2008, <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1275>.

<sup>66</sup> Shareholder Resolution filed by Trillium Asset Management Corporation Requesting Political Contributions by Ford Motor Company (2010), <http://www.onlineethicalinvestor.org/cidb/wc.dll?cidbproc~reso~9143> (asking for semi-annual reporting on Ford's political expenditures).

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Congress and members of the public who care about fair elections and clean government need to mobilize right away, a cause President Obama has said he would join. Congress should repair the presidential public finance system and create another one for Congressional elections to help ordinary Americans contribute to campaigns. It should also enact a law requiring publicly traded corporations to get the approval of their shareholders before spending on political campaigns.<sup>67</sup>

Editorials from *The Boston Globe*,<sup>68</sup> *The L.A. Times*,<sup>69</sup> *Philadelphia Inquirer*,<sup>70</sup> *Tennessean*,<sup>71</sup> and *Cleveland Plain Dealer*<sup>72</sup> echoed this call for change in U.S. securities laws.

### How Do Corporate Directors Feel About More Disclosure of Political Spending?

The data on how corporate directors view disclosure of political contributions is relatively sparse. However, a 2008 survey of 255 directors at Russell 2000 companies found that 88 percent said corporations should be required to publicly disclose all corporate funds for political purposes.<sup>73</sup> “Significantly, 76 percent agreed that ‘corporations should also be required to disclose payments made to trade associations and other tax exempt organizations which are used for political purposes.’”<sup>74</sup>

Directors surveyed thought they knew the requirements of campaign finance laws that applied to their corporations, but “overwhelming majorities of directors *incorrectly* think

<sup>67</sup> Editorial, *The Court's Blow to Democracy*, THE NEW YORK TIMES, Jan. 21, 2010.

<sup>68</sup> Editorial, *Corporations Aren't People, Don't Merit Special Protections*, BOSTON GLOBE, Jan. 23, 2010, [http://www.boston.com/bostonglobe/editorial\\_opinion/editorials/articles/2010/01/23/corporations\\_arent\\_people\\_dont\\_merit\\_special\\_protections/](http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/01/23/corporations_arent_people_dont_merit_special_protections/) (“Congress should require corporations to seek shareholders’ permission before spending money in political campaigns, coupled with a similar restriction on unions.”).

<sup>69</sup> Editorial, *The 1st Amendment and Corporate Campaigning*, L.A. TIMES, Jan. 22, 2010, <http://articles.latimes.com/2010/jan/22/opinion/la-cd-campaign22-2010jan22> (“Congress also could consider regulations that would require unions and public companies to ensure that their political activities are supported by the rank-and-file or shareholders.”).

<sup>70</sup> Editorial, *Corporate Blunder*, PHILADELPHIA INQUIRER Jan. 25, 2010, <http://www.philly.com/inquirer/opinion/82575027.html> (“Congress must immediately blunt the impact of the Supreme Court’s disastrous decision allowing unlimited corporate spending on elections.... They could require stronger rules against campaigns’ coordinating with outside groups, or require publicly traded firms to get approval from shareholders before spending on elections.” (emphasis added)).

<sup>71</sup> Editorial, *Money Motivates Push for Corporate Political Clout*, TENNESSEAN (Jan. 29, 2010), <http://www.tennessean.com/article/20100129/OPINION01/1290326/1008> (praising “U.S. Rep. Michael Capuano, D-Mass., who proposes legislation giving shareholders power to block corporate campaign spending” for having “the courage to continue fighting the heavy hand of the justices”).

<sup>72</sup> Editorial, *Supreme Court Ruling on Corporations and Free Speech Opens Big Checkbooks to Politicians*, CLEVELAND PLAIN DEALER, Jan. 26, 2010, [http://www.cleveland.com/opinion/index.ssf/2010/01/supreme\\_court\\_ruling\\_on\\_corpor.html](http://www.cleveland.com/opinion/index.ssf/2010/01/supreme_court_ruling_on_corpor.html) (“Congress might... be wise to guarantee shareholders a clear say in how their money is spent.”).

<sup>73</sup> Valentina Judge, *Survey Assesses Director Views on Political Disclosure*, CORPORATE SOCIAL ISSUES REPORTER (Mar. 2008).

<sup>74</sup> Press Release, Center for Political Accountability, *Directors Strongly Support Corporate Political Spending Disclosure, Question Whether Contributions Help Companies*, CPA Poll Finds (Feb. 28, 2008), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1259>.

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that all political contributions by corporations, trade associations and non-profits are required to be disclosed [and] [m]ore interestingly is the fact that 63% of directors mistakenly think that boards are required to approve and oversee political expenditures.”<sup>75</sup>

**Conclusion**

To protect the integrity of both our democracy and our capital markets, we urge the Committee, to exercise its power under the Commerce Clause and change U.S. securities laws to give shareholders the ability to approve future company expenditures and notice of past corporate political expenditures.

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<sup>75</sup> MASON-DIXON POLLING & RESEARCH, THE CENTER FOR POLITICAL ACCOUNTABILITY & ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH, THE WHARTON SCHOOL 2008 NATIONWIDE SURVEY OF MEMBERS OF CORPORATE BOARDS OF DIRECTORS ATTITUDES TOWARDS & AWARENESS OF CAMPAIGN FINANCE LAWS, CORPORATE OVERSIGHT OF POLITICAL SPENDING AND ACTIVITY, PROPOSED REFORMS (2008), <http://cpa.timberlakepublishing.com/files/CPA%20-%20Dirs%20Survey%20Report%20-%2003-20-08.pdf> (emphasis added).

**Biography of Ciara Torres-Spelliscy**

**Ciara Torres-Spelliscy** is Counsel for the Democracy Program at the Brennan Center for Justice at NYU School of Law, working on campaign finance reform and fair courts. Ms. Torres-Spelliscy earned her B.A. *magna cum laude* from Harvard. She earned her J.D. from Columbia Law School.

She is the co-author along with Ari Weisbard of *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALBANY GOV'T L.R. 194 (2008); *Electoral Competition and Low Contribution Limits* (2009) with co-authors Kahlil Williams and Dr. Thomas Stratmann; and *Improving Judicial Diversity* (2008) with co-authors Monique Chase and Emma Greenman, which was republished by Thompson West Reuters in *WOMEN AND THE LAW* (2009), as well as the author of *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach* (forthcoming 2010).

Ms. Torres-Spelliscy has been published in the *New York Law Journal*, *Roll Call*, *Business Week*, *Forbes*, *The Root.com*, *Salon.com*, *CNN.com* and the *ABA Judges Journal*. She has also been quoted by the media in *The Economist*, *The National Journal*, Sirius Radio and NPR. She provides constitutional and legislative guidance to lawmakers who are drafting bills. Before joining the Center, she worked as a corporate associate at the law firm of Arnold & Porter LLP and was a staff member of Senator Richard Durbin.

The CHAIRMAN. Thank you.  
Ms. Hayward.

#### STATEMENT OF ALLISON HAYWARD

Ms. HAYWARD. Thank you, Mr. Chairman, Ranking Member Lungen, and the committee for providing me the opportunity to talk to you today.

I have provided longer comments for the record, but what I want to do today is highlight a couple of things.

Two points predominantly. First, that, in my view anyway, the Citizens United opinion is a sound opinion and one that falls within the progression of precedent that the Court has enunciated when it has been dealing with independent expenditures. Secondly, my skepticism that the consequences from Citizens United are going to be as dramatic as maybe some of the colleagues that I have on this panel would believe.

First of all, Citizens United fits within the Court's jurisprudence when you look particularly at what the Court has enunciated with regard to independent expenditures.

When the Court was faced initially with the question of how to interpret the expenditure ban, it was in a test case teed up by a labor organization after the 1947 amendments to the Taft-Hartley Act, which, by the way, were added at the 11th hour in conference committee—not that any of you would be familiar with how that works—and without a lot of debate. Labor unions were fairly well convinced that it was going to be unconstitutional, and so were very comfortable with bringing a test case.

The Court in *U.S. v. CIO*, which came down in 1948, wasn't very helpful in providing constitutional guidance, because what they did is they looked at the law and said, whatever this law is intended to cover, it couldn't possibly cover your newsletter because that would be unconstitutional. So, no case.

A series of lower court cases, also test cases teed up by unions, did not go well for the Department of Justice either. In fact, the Department of Justice, through the late '40s and early '50s, adopted a policy of non-enforcement out of fear that enforcement of the Taft-Hartley amendment would be unconstitutional. And you don't have to take my word for that. There is testimony provided by the Assistant Attorney General at the time in 1955 to a Senate committee where he says essentially that. He is very open about it.

And the Court looks again at the law in the *Autoworkers* decision from 1956, I believe. And there Justice Frankfurter writing for the Court says, well, we are going to look at this again. It was a case involving some TV spots. The *Autoworkers* had a weekly television program, and some of these programs included advocacy for and against particular lawmakers, incumbents. And so a few episodes of this larger series were the subject of the prosecution, and the Court there said this is the kind of expenditure that the amendment was designed to address, but because the court below dismissed that question, we have to remand it back to the district court. On remand, they had a trial, and the jury acquitted the union of making an expenditure.

So, as you can see, as the cases start to develop on the expenditure ban, especially with regard to labor organizations that were



bringing these challenges—I think it is interesting to note that corporations weren’t testing the law to the same degree of vigor and enthusiasm that unions were—you don’t get a very clear enunciation of the constitutionality of an expenditure ban. You get a “sort-of-there-but-not-there” kind of cloud. And that cloud persists until I think *Austin v. Chamber of Commerce*.

In the interim, you have other questions involving independent expenditures, however, where the court is very clear that expenditure prohibitions are not constitutional. You have the independent expenditure cap in *Buckley v. Valeo*. You have the independent expenditure cap in the publicly funded presidential general election, which is the NCPAC decision.

And you have Justice Brennan—no conservative he—looking at the independent expenditure ban in MCFL and saying, okay—and this will sound familiar—whatever Congress meant to regulate, it wasn’t this. And so the legacy in MCFL is an exception to the expenditure ban when you have political nonprofits that are not using corporate money and there is no sense that there are shareholders whose money might be used against their will.

Then you have the *Austin* case, which *Citizens United* expressly overrules. The *Austin* case looked at, using strict scrutiny, the Michigan law that prohibited a Chamber of Commerce from doing the same thing that MCFL wanted to do. You can kind of see where the *Austin* lawyers thought this might be the next step. And, applying strict scrutiny, the court held that in fact that was constitutional, but using reasoning that was controversial at the time and I think has been controversial for a lot of scholars since then.

So when people look at *Citizens United* as a departure from doctrine, I am not so sure. The doctrine was never very well enunciated. It has been under a constitutional cloud. I think it is instructive that in the immediate aftermath of the passage of Taft-Hartley prosecutors were reluctant to prosecute on it because they didn’t want that bad precedent blowing up a tool that they were concerned might be helpful at least as a deterrent.

I want to talk quickly about consequences in the wake of *Citizens United*. I don’t know what the consequences will be. I am not sure anyone else does either. Corporations do spend money in the context of politics now. They are just issue advocacy not express advocacy. Now they can say directly what they couldn’t before.

Will that mean there is more spending or different scripts but the same spenders? I don’t know. But I just want to suggest that it is not a foregone conclusion that there will be a rush for additional money but simply that the people who are already spending might spend slightly differently.

Moreover, I would like to note that States that allow corporate expenditures in their campaigns have not seen fit to alter their corporate law or other aspects of their State laws that regulate those corporations in any sort of novel or dramatic ways and seem to be fairly comfortable with corporations and unions as participants in political dialogues.

Briefly—I think this has been mentioned, but I will say it from the panel—the foreign national ban remains the law. That is to say that foreign nationals cannot make contributions or expenditures

in any elections—Federal, State or local. Congress has exercised its authority in matters of foreign affairs and foreign policy to provide for a broad ban in the law. That has been interpreted by the FEC to include foreign national individuals and their ability to make decisions in fund raising. It might be that it is a comfort to some for that interpretation to be codified. I don't suggest that as my suggestion, but if there is a felt need to clarify or reiterate that ban, that would be one way to go.

On shareholder democracy, just real quickly. Shareholder democracy isn't very democratic if you have worked with corporations. For one, not all corporations are alike. I don't think anyone here is worried about the closely held corporation where you have five shareholders who also happen to be the same people who are officers and the same people who are directors. The corporate roster in any State is filled with those. These are people who are incorporating so that they can have a fictitious business name to do business so that they can sign leases in the name of a fictitious person, not in the personal name of the individual business person. Let's set those aside because I don't think those are what people are worried about.

When you have large corporations in a shareholder democracy, you have a couple of qualities in voting that I just want to alert you to; and the recommendation I would have is that you should find a corporate scholar to help you along the road if you feel like this is the place you want to go.

In corporate voting, you can buy votes. It is perfectly legal. You can enforce a contract to buy and sell your shareholder vote. You can engage—or hedge funds can engage, not you personally or me personally—in what is called empty voting, where you borrow the voting rights for somebody else. So you can vote in a way that is insincere to the corporation's interests because you have another investment interest over here. It is controversial, but it is an aspect of corporate governance today that you should know about. So you will want to tread carefully when you start looking at the shareholder feedback loop.

Another question that came up in my mind, just listening to my fellow panelists, was, suppose the shareholder is themselves a corporation or a labor organization. Do you have to have a second-tier approval process, and how attenuated does that chain need to be before you feel confident that there is consent? It may be something that you can't satisfy.

So, in closing, Congress has latitude in many areas of regulation that may relate to this. I just want to point out that Congress has latitude in setting the rules for who can contract with the Federal Government. So instead of looking at this as a regulation of political activity, you might look at it as a regulation of government contracting. Congress, of course, has great latitude in how it structures its ethics rules. You might look at tax incentives as another way to go.

And then, finally, I would like to endorse my fellow panelist Bob Lenhard's proposal about raising or eliminating the coordinated expenditure restrictions that apply to political parties. I think that would be a very healthy thing to do.

Thank you.

[The statement of Ms. Hayward follows:]

**Before the  
Committee on House Administration  
United States House of Representatives**

Statement of Professor Allison R. Hayward  
George Mason University School of Law

February 3, 2010

I would like to address two separate but related arguments today. The first is the contention that the Supreme Court overturned settled precedent in its *Citizens United v. Federal Election Commission* decision. The record of the corporate expenditure ban is not nearly so tidy. The second is the expectation that, as a result of the decision, corporations will spend unprecedented sums of money in campaigns. Both logic and history suggest this will not be the case.

**Precedent**

The expenditure ban found unconstitutional in *Citizens* was placed on corporations and unions in 1947. It had been controversial from the beginning. In the wake of that law's enactment, test cases brought against unions went poorly for the United States Department of Justice. This discouraging record, plus the fear that a test case might eventually yield a decision overturning the law, made federal prosecutors reluctant to bring more prosecutions.<sup>1</sup> Corporations and unions developed working rules in politics without official guidance.<sup>2</sup> The government's reluctance to enforce the expenditure ban only ceased once amendments to the Federal Election Campaign Act in 1974 provided for civil enforcement with the newly created FEC.

The Appendix accompanying my statement demonstrates the history and legal developments leading up to *Citizens United*. The Appendix also shows that when the Court has squarely faced limits on expenditures, it has found them unconstitutional. *Austin v. Michigan Chamber of Commerce* from 1990 falls outside this general trend. *Austin* professed to apply a strict standard of scrutiny to Michigan's corporate expenditure ban, but upheld it with reasoning that fell short of that standard. If for no other reason, the Court in overruling *Austin* in *Citizens United* should be applauded for bringing coherence and consistency to an area of constitutional law that had lacked both.

The legislative history of the expenditure ban undermines any argument that Congress carefully calibrated the law to serve compelling governmental interests, as strict scrutiny requires. The expenditure ban was placed in the lengthy (and

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<sup>1</sup> Herbert E. Alexander, *Money in Politics* 177-78 (1972) (noting dominant opinion at that time that expenditure ban probably unconstitutional).

<sup>2</sup> Alexander Heard, *The Costs of Democracy* 131-32 (1960).

management-supported) Taft-Hartley labor reform bill at the eleventh hour during conference committee.<sup>3</sup> There was no real debate in the House about the amendment.<sup>4</sup> The Senate debate pitted Senator Robert Taft against several Democratic Senators, but both sides knew Taft had the necessary votes, and the package passed easily.

Phrases from the Senate debate have been taken out of context in recent days to argue that the expenditure ban was an incremental clarification of an earlier consensus that the 1907 Tillman Act's contribution ban also reached independent expenditures. There is no doubt that Senator Taft seemed to argue this point, as did a 1946 House Committee report investigating labor union expenditures.<sup>5</sup> However, in context, one can read these statements as addressing what we would now describe as "coordinated expenditures." For instance, Taft contended the expenditure ban would be necessary to reach the coordinated purchase by a corporation of advertising *at the behest* of a candidate. The House Report likewise discussed expenditures "in [sic] behalf" of a federal candidate.

Even if Senator Taft did mean to argue that "contribution" properly understood would reach what we call independent expenditures, like those found constitutionally protected in *Citizens United*, it is impossible to see how the 1907 contribution ban could have meant that. The 1907 law prohibited "money contributions" specifically. It was later amended (to strike "money") with the discovery of the "in-kind" contribution.

Nor could that broad interpretation of "contribution" have developed over time. The distinction between contributions and expenditures is not new. The reporting requirements dating to the 1920s required separate contribution and expenditure reports. The 1940 Hatch Act amendments set a contribution limit of \$5,000, and a committee expenditure limit of \$3 million. Both would be rendered nonsensical if the meaning of "contribution" also included expenditures.

Moreover, contemporaneous interpretations of the law point toward a narrower construction of "contribution." Labor unions prepared to spend money independently on "voter education" in the 1944 election, believing that the statute allowed these activities. The Department of Justice concurred with this interpretation, analogizing the union activity to expenditures by incorporated newspapers.<sup>6</sup> President Truman, for his part, singled out the 1947 expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of

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<sup>3</sup> See *U.S. v. UAW-CIO*, 352 U.S. 567, 582-83 (1957).

<sup>4</sup> 93 Cong. Rec. 3522-23 (1947).

<sup>5</sup> 98 Cong. Rec. 6436-47; H.R. Rep. 79-2739 (1946).

<sup>6</sup> Department of Justice Clears PAC, 4 Law. Guild Rev. 49 (1944) (quoting DOJ press release).

need and quite foreign to the stated purposes of this bill” in his Taft-Hartley veto message.<sup>7</sup>

In short, the expenditure ban was a departure from existing law, enacted as an obscure and little-debated provision buried in a hotly contested legislative package.

### Impact

Many now argue that the elimination of the corporate expenditure ban (and, correspondingly, the ban on union expenditures) will result in massive election expenditures by corporations. History suggests that this will not be the case. The expenditure ban sponsors intended to thwart labor union activities. Unions certainly believed they were the target, and that the ban was unconstitutional. Unions wasted no time in litigating that question. Corporations, on the other hand, had less interest in making such expenditures, and were less inclined to litigate. Their preferred techniques for electoral spending instead involved less direct public education messages and internal political communications, and subsidies for contributions by individuals.<sup>8</sup> The latter remains illegal after *Citizens United*.

Going forward, unions are more likely to make campaign independent expenditures than corporations. Unions preferred this kind of outreach before, which is only logical.<sup>9</sup> Unions are “political” entities in ways corporations are not. The mission of a labor union is to represent the interests of its membership against the interests of management. The mission of a for-profit corporation is to make money; and for a non-profit corporation to advocate some issue or public good. Corporations bear costs in alienating portions of the public in ways unions do not. Corporations are thus overall much less likely to risk dissipating hard-won market goodwill by engaging in campaign advocacy.

### Recommendations

Several recommendations follow from the above. First, it is important to observe how corporations (or unions) react to *Citizens United* before legislating. Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction. It is doubtful that interest could be established to a court’s satisfaction *ex ante*.

Moreover, the conjecture about potential for abuse involves hypothetical conduct that is already illegal. Foreign nationals may not make contributions or

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<sup>7</sup> H.R. Doc. No. 80-334 (1947)

<sup>8</sup> See J.J. Wuerthner, Jr., *The Businessman’s Guide to Practical Politics* (1959); Heard at 132-34.

<sup>9</sup> See Heard at 198 (“American union leaders, as a general proposition, would rather spend the money themselves than turn it over to party politicians.”)

expenditures in any election (federal or local), nor may they play a role in the decisions behind fundraising or expenditures. Attempts to disguise the role of such a person, or the true source of funds, are also illegal. Deliberate falsification of reports is a federal crime. If the concern is that we lack the necessary resource to detect and prosecute bad actors, that problem will persist regardless of changes made to the substantive law.

About half the states permit corporate expenditures at present. These states have apparently not found it necessary to amend their state corporation codes in radical or novel ways to regulate pernicious corporate political activity. We may find the same is true in federal campaigns. In any case, federal lawmakers should hesitate before extending federal regulation over corporate governance, which traditionally has been provided in state law.

*Citizens United* should dispel any lingering doubts that the Supreme Court might not protect political speech with the same vigor it applies to restrictions on speech in the arts, education, or popular culture. We should welcome this clarification. It is the task of Congress, based on experience and sound logic, to respond appropriately if aspects of the political system endanger the integrity of the institution and its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available – campaign finance laws, ethics rules, tax incentives, or others – might work best to meet that threat.

**Appendix**  
**Benchmarks in the History of Federal Campaign Finance Law**  
**Expenditures by Corporations**

Prof. Allison R. Hayward

1907: Following revelations from the New York Insurance investigations, Congress passed the "Tillman Act," which banned "money contributions" by corporations.

1916: The Supreme Court upheld prosecution of several brewers for making campaign contributions to anti-Prohibition candidates.

1943: The corporate contribution ban was temporarily extended to labor unions for the duration of World War II, over Roosevelt's veto. Two weeks after enactment, the CIO organized the first PAC. The Justice Department confirmed that the PAC's expenditures were permitted under the new law.

1947: Over President Truman's veto, Congress made the labor contribution ban permanent, and extended to both corporations and unions a ban on expenditures. The first appearance of the expenditure ban was in the Taft-Hartley conference committee report. Unions pledged to violate this new restriction to bring about a test case.

1947-49: The Truman Justice Department prosecuted three separate unions for making illegal expenditures. In none of those cases did the Department prevail. In a series of corporate *contribution* investigations, the Department was able to negotiate pleas of nolo contendere. However juries acquitted the two corporations tried in court. The Department declined to bring prosecutions for the next six years.

1955-57: The Eisenhower Justice Department prosecuted the UAW for making illegal expenditures. The Supreme Court held that the union's conduct fell within Taft-Hartley's expenditure ban. The subsequent UAW trial ended in acquittal.

1963-66: Lewis Foods was prosecuted for using corporate funds to run a newspaper advertisement in favor of candidates who support "constitutional principles." After the first jury deadlocked, the judge in the second trial dismissed the indictment because the advertisement did not contain "active electioneering." The Ninth Circuit reversed, and on remand the company pled nolo contendere and paid a \$100 fine.

1971: The Federal Election Campaign Act reconfigured federal campaign finance laws, tightened reporting requirements, provided rules for labor and corporate PACs, but keeps prosecutorial authority with the Department of Justice.

1974: Major amendments to FECA in the wake of Watergate do not alter the corporate and labor bans, but do provide for civil enforcement of the law under the newly created FEC.



1976: The Supreme Court in *Buckley v. Valeo* interpreted the term “expenditure” to include only communications expressly advocating the election or defeat of a clearly identified candidate for federal office.

1978: The Court in *First Nat’l Bank of Boston v. Bellotti* held unconstitutional under the First Amendment a state law prohibiting corporate expenditures in ballot measure campaigns.

1985: In *FEC v. NCPAC*, the Court held unconstitutional a law limiting to \$1,000 independent expenditures by PACs in presidential elections.

1986: The Court in *Massachusetts Citizens for Life* held unconstitutional the corporate expenditure ban as applied to a nonprofit pro-life group, and reiterated its *Buckley* holding that “expenditures” included only communications containing express advocacy.

1990: The Court in *Austin v. Michigan Chamber of Commerce* held constitutional a state corporate expenditure ban applied to a business association.

2002: Congress enacted the Bipartisan Campaign Reform Act. To address the growing practice of using corporate and labor funds in “issue advertising” this law extended the expenditure ban to targeted “electioneering communications” that mentioned a candidate with 30 days of a primary or 60 days of a general election.

2003: The Court in *McConnell v. FEC* upheld the electioneering communications restrictions against a facial challenge to its constitutionality.

2007: In *Wisconsin Right to Life v. FEC*, the Court held the electioneering restrictions unconstitutional as applied to advertising that did not contain the “functional equivalent” of express advocacy.

2010: In *Citizens United v. FEC*, the Court held unconstitutional the ban on independent expenditures by corporations.

## Professor Allison Hayward

Prof. Hayward is Assistant Professor of Law at George Mason University School of Law. She has taught constitutional law, election law, ethics, and civil procedure. She writes widely on election law topics and has been published in a variety of law journals and magazines, including the *Harvard Journal of Legislation*, *Case Western Reserve Law Review*, *National Review*, the *Weekly Standard*, *Reason*, the *Journal of Law and Politics*, *Political Science Quarterly*, *The Green Bag*, and the *Election Law Journal*.

Prof. Hayward graduated from Stanford University with degrees in political science and economics, and received her law degree from the University of California, Davis. She clerked for Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. She was an associate at Wiley, Rein & Fielding in Washington DC and Of Counsel at Bell, McAndrews & Hiltachk in Sacramento, California. More recently, she was Counsel to Commissioner Bradley A. Smith of the Federal Election Commission.

Before attending law school, Prof. Hayward served as staff in the California legislature and managed a state assembly campaign. She is a native Nevadan and was born and raised in Las Vegas. She now lives in McLean, Virginia with her husband and two children.

Prof. Hayward is a Board member of the Center for Competitive Politics and Chairman of the Federalist Society's Free Speech and Election Law Practice Group. She also serves on the Board of the Office of Congressional Ethics. She is an active member of the California and Washington DC bars.

The CHAIRMAN. Thank you.  
Mr. Simpson.

# **STATEMENT OF STEVEN M. SIMPSON**

Mr. SIMPSON. Mr. Chairman, Ranking Member Lungren, and members of the committee, thank you very much for inviting me to testify here today.

The Supreme Court's decision in *Citizens United* is one of the most important first amendment decisions in a generation. It arose because the campaign finance laws prevented a corporation from disseminating a film and even threatened to regulate the publishing and dissemination of books. As the Court stated in the decision, "If the first amendment has any force, it prohibits Congress from fining or jailing citizens or associations of citizens for simply engaging in political speech."

Critics have lodged a number of wild claims about the decision, but in assessing its impact we should follow the Court's own wise counsel and not let rhetoric obscure reality. Toward that end, I would like to address some of the more prominent myths that have been offered about the *Citizens United* decision.

First is the idea that under *Citizens United* corporations will be able to buy elections. Now, a corporation can no more buy an election with political advertising than they can buy market share with commercial advertising. If they could, we would all be driving American cars and drinking new Coke, Michael Huffington would have been voted Senator a long time ago, Ross Perot would have been voted President, John Corzine would not have lost in New Jersey. The list goes on and on.

While it is certainly true that money is necessary to win a campaign, that simply does not translate into victory for the biggest spender. Indeed, as Professor Hayward made clear, 26 States allow corporations to make independent expenditures in elections. They have not become hotbeds of corruption, nor have corporations been able to buy their elections.

But the claim that anyone can buy an election, whether a corporation or anyone else spending money on advertising in an election, is not only false, it contradicts the very idea of our constitutional republic. As the Court said in *Citizens United*, "The first amendment confirms the freedom to think for ourselves." In short, corporate spending does not buy elections anymore than anyone else's spending does. It buys speech that seeks to persuade. For those who don't agree with that speech, the Court provided the answer in *Citizens United*, "It is our law and our tradition that more speech, not less, is the governing rule."

The second myth I would like to address is that corporations, unlike people, have no free speech rights. Now, it is true certainly that corporations are not people, but they are made up of people just like any other association that exists today. Indeed, concerns about corporate speech obscure the fact that campaign finance laws in essence treat all groups basically the same way.

A case in point is a case called *SpeechNow v. FEC*, a case that I am now litigating along with the Center for Competitive Politics in the D.C. circuit. *SpeechNow* is an unincorporated association. It is a group of individuals who wish to get together, exercise their

right of association, and spend their money advocating the election or defeat of candidates.

The campaign finance laws treat this group, this unincorporated association, essentially exactly the same as a corporation. To speak, they must become a political committee, and they must comply with the same onerous burdens that the Supreme Court just struck down as they apply to corporations. Neither the FEC nor campaign finance reform groups have said that SpeechNow.org should be relieved of these burdens because it is not a corporation. And critics have responded that the laws that were struck down in Citizens United don't actually prevent anyone from speaking, they merely regulate the funding of that speech.

But this ignores the very real burdens of political committee status that the Supreme Court highlighted, excuse me, in the Citizens United decision. For instance, in a recent study conducted by Dr. Jeffrey Milyo of the University of Missouri on behalf of my organization, the Institute for Justice, 255 individuals were asked to comply with the regulations that apply to ballot issue committees in the States. On average they managed to correctly complete just 41 percent of the tasks that they were asked to complete. After the exercise many expressed frustration, saying things like this was worse than the IRS and a person needs a lawyer to do this correctly.

It is no exaggeration to say that the campaign finance laws often rival the Tax Code in their complexity. Indeed, during the oral argument in the Speech. Now in this case I had the surreal experience of debating with several judges on the D.C. Circuit as to whether the tax laws are more or less burdensome than the campaign finance laws. Now, reasonable minds can disagree on that question, but it ought not be debatable that if Americans come to regard speaking out about political elections, as they do filing their income tax returns, far fewer of them would bother to try to speak out at all.

In conclusion, in today's world money and organization are not merely important to political speech, they are absolutely indispensable to it. As Chief Justice Roberts said in his concurring opinion in the Citizens United decision, the first amendment protects more than just the individual on a soap box and the lonely pamphleteer. The first amendment's protections apply whether the speaker is an individual or a group, whether he uses a quill pen, a printing press, or the Internet. That the Supreme Court understands this is not cause for concern, it ought to be cause for celebration.

Thank you.

[The statement of Mr. Simpson follows:]

Before the  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON HOUSE ADMINISTRATION

Prepared Testimony of

Steven M. Simpson  
Senior Attorney  
Institute for Justice

re

Defining the Future of Campaign Finance  
in an Age of Supreme Court Activism

February 3, 2010

Mr. Chairman and members of the Committee:

Thank you for inviting me to testify on campaign-finance reform in light of the Supreme Court's important recent decision in *Citizens United v. FEC*. I am a senior attorney at the Institute for Justice, a non-profit legal services organization dedicated to increasing constitutional protections for individuals in four core areas: property rights, economic liberty, educational choice, and freedom of speech. I have litigated cases for the Institute for nearly nine years, with the last several years devoted exclusively to campaign finance and freedom of speech, and I have written amicus briefs for several Supreme Court campaign finance cases, including *Citizens United*. I am the lead attorney in *SpeechNow.org v. FEC*, which the Institute is litigating along with the Center for Competitive Politics. That case is currently pending before the United States Court of Appeals for the District of Columbia Circuit.

The Supreme Court's decision in *Citizens United*, which struck down restrictions on corporate spending on speech during elections, has once again ignited a controversy over money in politics. Supporters of stringent campaign finance laws are claiming that the decision will lead to a flood of corporate money in elections, that it will destroy democracy,<sup>1</sup> that corporations

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<sup>1</sup> "With a stroke of the pen, five Justices wiped out a century of American history devoted to preventing corporate corruption of our democracy." Statement of Fred Wertheimer, President, Democracy 21, Supreme Court Decision in *Citizens United* Case is Disaster for American People and Dark Day for the Court (Jan. 21, 2010), available at <http://democracy21.org>.

will buy elections,<sup>2</sup> and that the decision is an example of conservative judicial activism<sup>3</sup> and the worst decision since *Dred Scott*.<sup>4</sup>

All of these claims are vastly overblown. Not only is *Citizens United* not an activist decision, it is based on fundamental First Amendment principles on which courts have relied for decades. Twenty-six states allow corporations to spend money on independent speech during elections. Corporations have not managed to buy elections in these states, nor have these states become hotbeds of corruption. In short, in assessing the impact of *Citizens United* we should follow the Court's own wise counsel and not let rhetoric obscure reality.

Toward that end, I offer the following responses to some of the most prominent myths about *Citizens United*.

**Myth 1: *Citizens United* is an Activist Decision That Reverses 100 Years Of Precedent**

*Citizens United* is based on enduring First Amendment principles, nearly all of which were announced or reaffirmed in *Buckley v. Valeo* over thirty years ago. Then, as now, the Court recognized that political speech is at the core of the First Amendment's protections.<sup>5</sup> Then, as now, the Court rejected the notion that government may attempt to equalize all voices, either

<sup>2</sup> "The bottom line is, the Supreme Court has just predetermined the winners of next November's election. It won't be the Republican or the Democrats and it won't be the American people; it will be Corporate America." *GOP Doesn't Run 2010 Census, But Hopes to Count Your Money*, The Post Standard (Syracuse, N.Y.), Jan. 24, 2010, at A9 (quoting Sen. Charles E. Schumer (D-N.Y.)).

<sup>3</sup> "The Supreme Court's 5-4 decision holding that corporations and unions can spend unlimited amounts of money in election campaigns is a stunning example of judicial activism by its five most conservative justices." Erwin Chemerinsky, Dean, University of California, Irvine School of Law, Op-Ed, *Conservatives embrace judicial activism in campaign finance ruling*, L.A. Times, Jan. 22, 2010, available at <http://articles.latimes.com/2010/jan/22/opinion/la-oe-chemerinsky22-2010jan22>.

<sup>4</sup> "This is the most irresponsible decision by the Supreme Court since the *Dred Scott* decision over a hundred years ago." Rep. Alan Grayson (D-FL), *Countdown with Keith Olbermann* (MSNBC television broadcast Jan. 21, 2010), available at [http://www.msnbc.msn.com/id/3036677/ns/msnbc\\_tv-countdown\\_with\\_keith\\_olbermann#34984984](http://www.msnbc.msn.com/id/3036677/ns/msnbc_tv-countdown_with_keith_olbermann#34984984).

<sup>5</sup> *Citizens United v. FEC*, No. 08-205, slip op. at 33 (Jan. 21, 2010) ("Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'") (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

directly, by silencing some voices to make room for others, or indirectly, by restricting the funds that may be devoted to speech.<sup>6</sup>

Indeed, the roots of these principles date back to the founding era. James Madison described the right to free speech as “the right of freely examining public characters and measures . . . which has ever been justly deemed, the only effectual guardian of every other right.”<sup>7</sup> Echoing this view, the Court stated in *Citizens United* that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>8</sup>

The Court recognized, as did the Founders, that special interests—or “factions” in the Founders’ words—might try to influence the course of government. But for the Court, as for the Founders, limiting freedom of speech would be like eliminating air to prevent fire.<sup>9</sup> “Factions will necessarily form in our Republic, but the remedy of ‘destroying the liberty’ of some factions is ‘worse than the disease.’ . . . Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false.”<sup>10</sup>

To sum up the point, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”<sup>11</sup>

Critics of *Citizens United* have said that it was “activism” for the Court to hold that corporations receive the benefit of the First Amendment protections. But, as the Court noted, it has protected freedom of speech for corporations for decades.<sup>12</sup> While it is true that bans on

<sup>6</sup> *Citizens United*, slip op. at 34 (“The First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

<sup>7</sup> James Madison, Virginia Resolutions Against the Alien and Sedition Acts, (Dec. 21, 1798), reprinted in JAMES MADISON WRITINGS 590 (Jack N. Rakove ed., 1999).

<sup>8</sup> *Citizens United*, slip op. at 23; see also *id.* (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”); *id.* at 24 (“The First Amendment protects speech and speaker, and the ideas that flow from each.”).

<sup>9</sup> *Id.* at 39 (quoting THE FEDERALIST No. 10, at 130 (J. Madison) (B. Wright ed. 1961)).

<sup>10</sup> *Citizens United*, slip op. at 39.

<sup>11</sup> *Id.* at 33.

<sup>12</sup> *Id.* at 25-26.



corporate contributions to candidates have been in place for nearly a century, *Citizens United* involved a ban on corporate *independent expenditures*. Congress did not ban corporate independent expenditures until 1947.<sup>13</sup> President Truman vetoed the ban, in part because he saw it as a “dangerous intrusion on free speech,”<sup>14</sup> but Congress overrode the veto.

It was not until 1990, in *Austin v. Michigan Chamber of Commerce*, that the Supreme Court squarely addressed the ban on corporate independent expenditures in candidate elections.<sup>15</sup> Although the Court had previously ruled in *First National Bank of Boston v. Bellotti* that a state could not prevent a corporation from spending money on independent advocacy during ballot-issue elections,<sup>16</sup> in *Austin* the Court reversed course and upheld the ban by a narrow 5-4 vote, inventing a new rationale for limiting speech—the alleged “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”<sup>17</sup> This “anti-distortion” rationale had never been discussed before and was inconsistent with *Buckley*’s holding that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>18</sup>

Thus, *Austin* was the outlier, and in overturning it and the portion of *McConnell v. FEC* that relied on it, the Supreme Court was returning to core First Amendment principles. As the Court itself noted in *Citizens United*, deference to Congress cannot extend to laws that violate the

<sup>13</sup> Section 314, 61 Stat. 159 (June 23, 1947).

<sup>14</sup> Message from the President of the United States at 9, H.R. Doc. No. 80-334 (1947).

<sup>15</sup> Prior to 1990, the closest the courts came to addressing the ban on corporate independent expenditures was in *United States v. International Union Auto Workers*, 352 U.S. 567 (1957). But in that case, as Professor Allison Hayward notes, the Court “declined to reach the issue of whether . . . prosecution would violate the union’s constitutional rights.” Revisiting The Fable Of Reform, 45 Harv. J. on Legis. 421, 463 (2008).

<sup>16</sup> 435 U.S. 765 (1978).

<sup>17</sup> 494 U.S. 652, 660 (1990).

<sup>18</sup> 424 U.S. 1, 49 (1976).

First Amendment.<sup>19</sup> Nor is this the first time the Court has overruled prior precedent in modern times. In *Brown v. Board of Education*,<sup>20</sup> for instance, the Court rejected the idea of “separate but equal” it had adopted in *Plessy v. Ferguson*.<sup>21</sup> In *West Virginia State Board of Education v. Barnette*, the Court held that public schools could not compel students to salute the American Flag and recite the Pledge of Allegiance, overruling a decision handed down a mere three years earlier.<sup>22</sup> And, in recent years, the Supreme Court in *Lawrence v. Texas*<sup>23</sup> refused to follow its earlier decision in *Bowers v. Hardwick*<sup>24</sup> despite that decision’s seventeen-year pedigree.

#### **Myth 2: Under *Citizens United*, Corporations Will Buy Elections**

Corporations can no more buy elections with political advertising than they can buy market share with commercial advertising. If they could, we would all be driving American cars and drinking New Coke; Michael Huffington would have long since been elected Senator and Ross Perot would be President. While it is certainly true that money is necessary to win a campaign, that simply does not translate into victory for the biggest spender.<sup>25</sup> The examples of failed political campaigns that spend millions are as numerous as failed advertising blitzes in the commercial realm.

In fact, the evidence that even direct contributions to candidates cause corruption of the political process is weak at best. Evidence from the political science literature suggests that campaign contributions made directly to candidates have very little to no discernable impact on

<sup>19</sup> *Citizens United*, slip op. at 45; see also *id.* at 12 (“It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications.”); *id.* at 4 (Roberts, C.J., concurring). (“It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”).

<sup>20</sup> 347 U.S. 483 (1952).

<sup>21</sup> 163 U.S. 537 (1896).

<sup>22</sup> 319 U.S. 624 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).

<sup>23</sup> 539 U.S. 558 (2003).

<sup>24</sup> 478 U.S. 186 (1986).

<sup>25</sup> Gary C. Jacobson, *The Effect of the AFL-CIO’s “Voter Education” Campaigns on the 1996 House Elections*, 61 J. OF POL. 185, 186 (1999) (“We also have abundant evidence that money, by itself, does not defeat incumbents. Only in combination with potent issues and high-quality challengers do even the best financed campaigns have a decent chance of succeeding.”).

public policy, let alone any undue or corrupt influence.<sup>26</sup> Furthermore, in the only empirical study of which I am aware that examines the effects on the appearance of corruption of limits on direct contributions to candidates, the authors found that contribution limits do not improve citizens' view of government.<sup>27</sup> To date, there have been no scientific studies that attempt to explore the relationship between independent expenditures—by corporations or anyone else—and political corruption. However, 26 states allow corporations to make independent expenditures, but they have not become hotbeds of corruption nor have corporations managed to buy their elections.<sup>28</sup>

But worse than the factual errors implicit in this claim is the negative view of American voters that it betrays. According to this view, voters are incapable of thinking for themselves. Instead, they passively accept whatever thoughts and views they happen to see in slick advertising campaigns. But this is contrary to the central assumption of the First Amendment. As the Court put it in *Citizens United* “[t]he First Amendment confirms the freedom to think for ourselves.”<sup>29</sup> That freedom means that citizens get to decide whom to listen to and citizens get to decide how and when to speak, what message to convey, and what means to use to convey it.

Corporate spending does not buy elections; it buys speech. That speech seeks to convince voters to vote one way or another. For those who do not agree with that speech, the First Amendment again provides the answer: “[I]t is our law and our tradition that more speech, not less, is the governing rule.”<sup>30</sup>

<sup>26</sup> Stephen Ansolabehere, Rebecca Lessem & James Snyder, *Why is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003).

<sup>27</sup> David Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23 (2006).

<sup>28</sup> Supplemental Brief of Amicus Curiae Chamber of Commerce of The United States of America in Support of Appellant at 8-12, *Citizens United v. FEC*, No. 08-205 (Jan. 21, 2010).

<sup>29</sup> Slip op. at 40.

<sup>30</sup> *Citizens United*, slip op. at 45.

Corporations do not speak with one voice any more than individuals do. There are nearly six million corporations in this nation, most of them quite small. Allowing them to speak and to provide their unique views and information during elections is not an aberration that will lead to corruption; it is precisely what the First Amendment was designed to do.

**Myth 3: Corporations, Unlike People, Have No Free Speech Rights**

It is true that corporations are not people. But they are made up of people, like every other association—from partnerships, to marriages, to neighborhood groups, to nonprofits, and all the way up to the New York Times. The First Amendment protects the right of association just as it protects the freedom of speech. If individuals have the right to speak, then they have the right to join with others to speak, whether they join with one person or 10,000. The Court in *Citizens United* recognized that corporations must be protected under the First Amendment because corporations are associations of individuals, and because nothing in the First Amendment exempts particular associations simply because they adopt the corporate form.<sup>31</sup> In that respect, *Citizens United* is not a corporate speech case; it is a case that recognizes the importance of the right of association along with the right to freedom of speech.

It is important to note that the federal campaign-finance laws treat all groups in essentially the same manner. Any group of two or more persons that raises or spends more than \$1,000 and has the primary purpose of influencing elections is a “political committee” and is subject to the same restrictions as a corporation.<sup>32</sup> It must register as a political committee and comply with the same burdensome regulations that apply to corporate PACs, including limitations on the source and amounts of funds it may devote to speech.<sup>33</sup> The FEC and campaign-finance reform groups have taken the same approach to unincorporated groups as they

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<sup>31</sup> *Id.* at 25.

<sup>32</sup> See 2 U.S.C. § 431(4).

<sup>33</sup> See *Citizens United*, slip op. at 21-23.

have to corporations, and have argued that they must register as PACs and comply with the same onerous restrictions that apply to PACs in order to speak.<sup>34</sup> In short, the notion that supporters of campaign finance laws are particularly concerned about corporations is false. They want to prevent *all* groups from spending unregulated funds on independent speech during elections.

Critics of *Citizens United* respond that the laws did not prohibit corporations from speaking, they simply required them to speak through political committees. But this ignores the very real burdens of political committee status. As the Supreme Court noted, the FEC has adopted 568 pages of regulations, 1278 pages of explanations and justifications of those regulations, and 1771 advisory opinions since 1975.<sup>35</sup> These rules define and regulate 71 distinct entities and 33 different types of speech.<sup>36</sup> Ninety-one of these rules, spanning over 100 pages of the federal register, apply to political committees.<sup>37</sup> Political committees must register with the FEC, appoint a treasurer, and forward all receipts to the treasurer within days of their receipt. They must keep detailed records of all funds received and all expenditures made, they must file detailed reports to the FEC disclosing all activities on either a monthly or quarterly basis.<sup>38</sup> Those who operate committees out of their homes or offices must determine the value of the space, utilities, and overhead being allocated to the committee and properly account for and disclose that information to the FEC. Even terminating a political committee requires the FEC's permission.

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<sup>34</sup> See Brief for the Federal Election Commission at 43, *SpeechNow.org v. FEC*, No. 09-5342 (D.C. Cir. Dec. 15, 2009).

<sup>35</sup> *Citizens United*, slip op. at 18.

<sup>36</sup> *Id.*

<sup>37</sup> See 11 C.F.R. parts 1-2-106, 110, 113, 116.

<sup>38</sup> *Citizens United*, slip op. at 21-22.

It is no exaggeration to say that the campaign-finance laws rival the tax code in their complexity.<sup>39</sup> Indeed, last week during oral argument in *SpeechNow.org v. FEC*, I had the surreal experience of debating with several judges on the D.C. Circuit about whether the regulations that apply to groups organized under section 527 of the tax code are more burdensome than the regulations that apply to political committees under the campaign-finance laws. Reasonable minds can disagree on that question, but it ought not be debatable that if Americans come to regard speaking out as equivalent to filing their income tax returns, a lot fewer of them will bother trying to speak out at all.

#### Conclusion

In today's world, speaking effectively to large numbers of people requires large amounts of money and often some sort of organization. Money and associations are not simply important to political speech, they are indispensable to it. While it is probably true that the Founders could not have imagined the immense corporations that exist today, there is probably little about our world that the Founders could have imagined. But that fact should no more define the reach of our voices than it should limit the scope of our knowledge or the technologies we use to expand it. As Chief Justice Roberts said in his concurring opinion in *Citizens United*, "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."<sup>40</sup> And as the Court stated, "the First Amendment protects speech and speaker."<sup>41</sup> That applies whether the speaker is an individual or a group and whether they use a quill pen, a printing press, or the Internet. That the Supreme Court understands that is cause for celebration.

<sup>39</sup> See *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) ("For the regulator's hand, once loosed, is not easily leashed. The Code of Federal Regulations, or its state equivalent, is no small thing. It is no unfounded fear that one day the regulation of elections may resemble the Internal Revenue Code, and that impossible complexity may take root in the very area where freedom from intrusive governmental oversight should matter most.").

<sup>40</sup> Slip op. at 1 (Roberts, C.J., concurring).

<sup>41</sup> *Id.* at 24.

Thank you.

## BIOGRAPHY

### **Steve Simpson Senior Attorney**

Steve Simpson is a senior attorney at the Institute for Justice. He litigates primarily free speech cases in the state and federal courts across the country. He is currently lead counsel in *SpeechNow.org v. FEC*, a challenge to the federal campaign finance laws that prevent individuals from banding together to spend money on speech for or against candidates. Steve is also lead counsel in two challenges to Colorado's campaign finance laws, and he has been involved in a wide variety of other cases, including IJ's challenge to New York's ban on direct shipping of wine, which resulted in a win before the United States Supreme Court in *Granholm v. Heald*. Steve's views and writings have been published in a number of print and on-line newspapers and journals, including Legal Times, the Washington Post, the Chicago Tribune, and the Washington Times.

Before coming to the Institute, Steve spent five years as a litigator with the international law firm Shearman & Sterling. Steve has authored and co-authored articles and practice guides on federal securities laws, the non-delegation doctrine, and the First Amendment. He is a graduate of New York Law School, where he was a managing editor and articles editor of the law review. After law school, he spent two years clerking for Judge Lenore C. Nesbitt on the United States District Court for the Southern District of Florida. Steve is a member of the bars of New York, New Jersey, and the District of Columbia.



The CHAIRMAN. Thank you and thank all of you. We will now open up for questions, and I would like to start and just ask all of you the same exact question if you would just respond briefly.

I am not an expert on constitutional law, but I am a union member and a union official for the last 45 years. I know the difference between individuals who join unions and individuals who purchase stocks. Unions are membership organizations, union leadership democratically elected and held accountable to its members in regularly scheduled elections. Unions are nonprofit organizations bringing together individuals, individual interests for the purpose of increasing bargaining power and effectively petitioning government. Corporations have shareholders. Neither boards nor their executive management teams are democratically elected. They are constituted to accumulate wealth in the form of a shareholder value rather than represent the board interest of the shareholders and petition their government.

Does this distinction between the unions and their corporation merit different treatments for unions and corporations in America, election law and the election law in the wake of citizen alliance? In other words, should unions and corporations be treated differently?

Start with you, sir.

Mr. LENHARD. I guess the—

The CHAIRMAN. Because they are lumped in in this decision and I would like to know.

Mr. LENHARD. The easy answer is I don't know. Having been both a member of a union and a shareholder, I found the democratic experience in the union far preferable to that of being a shareholder. I think that there are a number of procedural protections that union members have, both in terms of the—and I actually practiced in this area of law for a while early in my career. The courts and in some cases legislatures have given people who are covered by collective bargaining agreements the right to dissent and to reduce the amount of money they pay the union by the proportion of the union's expenditures that are attributable to political activity, and it is not just campaign contributions, a lot of political activity. And people do actively use that right and they do pay reduced sums. And they—so there is, I think, a reasonably robust process whereby people who want to both get information about the money that is spent on political activities and the ability to get a portion of that back.

The same is far from true in the corporate setting, where shareholders have a very limited set of rights to vote for the board, approve auditors, and particular transactions.

My sense is that the—and the other factor in this—is the enormous disparity in wealth available to unions and available to corporations make them very, very different entities. Unions are viewed as more politically powerful because the members are very active and volunteer their time. But the size of resources the unions have is really tiny in comparison to that of corporations.

The CHAIRMAN. Thank you. Ms. Dianis.

Ms. DIANIS. I am going with his answer. I have nothing to add to that. I think that the point of the activity and involvement of union members versus shareholders does bring a significant dis-

inction and that they should be treated differently because of that. Again, the point about the activity of union members and their political activity brings it also different from the shareholder who gets a piece of mail every once in a while and asking basically for their proxy instead of their real involvement.

The CHAIRMAN. Ms. Wilson.

Ms. WILSON. I certainly think that you, Mr. Chairman, summed up the differences between unions and corporations in terms of their governance, and I think that is a very key point in the discussion. But I also would like to look at it from the voters' perspective, and from the voters' perspective I believe that the disclosure and disclaimer requirements, whether or not it is a union-paid advertisement or a corporation-paid advertisement, may indeed look very similar.

Thank you.

The CHAIRMAN. Ms. Spelliscy.

Ms. TORRES-SPELLISCY. To be honest, the Brennan Center has not looked at the union question, but we love a good hypothetical. And if the committee is interested in that particular question, I would be happy to get my cracker jack lawyers on that question.

[The information follows:]

The CHAIRMAN. That is why I asked the question because I am interested in it, and I appreciate your help.

Ms. Hayward.

Ms. HAYWARD. I have not written anything formally on this but I have thought about it a lot in my research of the history of the law, because it does seem to me that the reason labor unions and corporations are treated identically in the law has much more to do with the political context and a little tit-for-tat game going on between Democrats in the White House and Republicans in—at least after the 1946 election controlled both Houses of Congress with fairly great majorities. And they are different in such different ways that I don't think that you can say that one deserves less regulation than the other. They deserve different tailored regulations to address the fact that labor unions are membership organizations with a great deal of job basis power over their members where publicly held corporations have this very dispersed and dissolute relationship with hundreds of thousands of people that any individual shareholder may or may not care about very much, especially if he owns the shares sort of indirectly through a fund.

I think maybe you could make an analogy between a local labor organization and a small closely held corporation and the kinds of tensions you would have there, but even there I think the differences are much greater than the similarities. That is in fact an area of legislation that would take a lot of hard original thinking to think about the differences in governance and oversight and the relationship between the decision makers and the rank and file of the shareholders. And it would be a great thing to do because it hasn't been done, and I think that is just more evidence that the law that we have is not closely tailored.

The CHAIRMAN. Mr. Simpson.

Mr. SIMPSON. As long as association with either a union or a corporation is voluntary then for political speech purposes they should be treated identically. Now that has not always been the case.

Under many State laws members of unions and even nonmembers in certain occupations have to pay dues to the union and the Supreme Court has dealt with that by effectively requiring the unions to allow them to opt out of paying for political speech. I think that is appropriate.

One thing though that is lost in this debate about corporations is that shareholders buy their stock voluntarily. Indeed, with publicly traded corporations it is probably easier to disassociate yourself from a corporation than it is for any other entity ever devised by the mind of man. You can go on the Internet, you can sell your stock in 5 minutes. That is not true of any government I am aware of, it is not true of unions, and the idea that shareholders who buy shares of stock really want to manage the corporation and make decisions about what the corporation spends its money on is counterintuitive, it is counterfactual. That is why they are shareholders, because they don't want to run the corporation.

The CHAIRMAN. Thank you. It is the selling of the stocks that is—it is not the troubling part as to who is buying them. But just for the record, every union, any expenditure, whether it comes from the general treasury, from a political action fund gets voted on by the members.

Mr. SIMPSON. I am sorry.

The CHAIRMAN. Every union, every union that has an expenditure, whether it may be from the general treasury or from their political action fund, gets voted by the members or ratified by the members, everyone, not by proxy. You have to be there. They can vote yes or they can vote no. So they are going to vote on that.

But I appreciate that and I appreciate your answers and thank you for your testimony today.

Mr. Lungren.

Mr. LUNGREN. I would just like to offer a hypothetical to all of you. Let's say on election day at 5:00, polls are going to close at 8:00, an organization has robo calls going to the households of a single party in which they indicate that the results are in in the East and the Midwest and the candidate of the other party has succeeded and it will make no difference whatsoever in the vote turnout in California. This goes only to the party that they are suggesting is losing the presidential election, it goes on at 5:00; that is, with 3 hours left in the voting. Is that kind of a communication the kind of communication that should be controlled, required disclosure, or does it depend on the organization?

Mr. Lenhard.

Mr. LENHARD. I guess that ultimately is a question for you to decide. Currently under the statute I think it would be. I think that you would have to provide some sort of disclaimer. There is a bit of a struggle at the FEC over whether certain kinds of media, of communication, robo calls being one, polling being another, would require a disclaimer, but I think that the state of the law now is that it would.

Mr. LUNGREN. The interesting thing that happened is, that happened in my election. In fact, I was the recipient of one of those calls and we were told that because they did not specifically advocate it was merely a news report, that it did not—was not required to be reported. And I guess what I am just trying to point out is

that it is very difficult to kind of control the language because they didn't advocate one way or the other. Now obviously it was a suppression call. It was only to people registered in my party to try to suppress the vote in our elections, and we had no recourse. It is kind of interesting how those things can kind of go on and, you know, technically it is true, they didn't say vote for someone, but I think we know what the purpose was. The difficulty is for the government then to come in and to try and figure out what the motivation was and then punish you or say, no, we are not going to punish you, I think is giving government a tremendous amount of power that I don't want them to have, even though it was against me and the candidates that I supported.

At least three of the panelists here today have advocated taxpayer financing of congressional campaigns. Ms. Torres-Spelliscy, you did specifically and your organization does. What do you say about taxpayers who disagree? For instance, we have the scenario now where you have—where usually—it used to be that major candidates for the presidency opted for the public financing, but we have had a guy named Lyndon LaRouche who goes around with public financing even from—I think at one point in time from a prison cell for President. I didn't want to see money used for that purpose. Of course that was the voluntary system. But as I understand those who are advocating this, you are not talking about a voluntary system that is only based on taxpayers' contributions, you are talking about from general revenues.

Wouldn't the taxpayer be put in the same position as the stockholder that you have talked about but even in a more difficult situation in that you really wouldn't have any more recourse because the Federal Government was making this money available with candidates with whom you may have a very, very strong disagreement?

Ms. TORRES-SPELLISCY. Well, as you said, it really depends on how you structure FENA. The way that the presidential public financing system has always worked is it is paid for by a taxpayer checkoff.

Mr. LUNGREN. Right. Do you assume that there is sufficient support for that, for public financing for all congressional campaigns, all elections, that that would be sufficient funding?

Ms. TORRES-SPELLISCY. It could be if you had a good public education campaign and people realized the difference between a privately funded candidate and a clean elections candidate.

Mr. LUNGREN. Do all of you agree that at least one of the decisions or the fundamental premises of *Buckley v. Valeo* is that money is speech, at least as defined as someone's ability to express themselves, to use it on behalf of themselves if they run for office or to use it on behalf of expressing a political position? Does anybody disagree with that being a fundamental part of *Buckley v. Valeo*?

Mr. LENHARD. I guess if I could—I mean, I think I would frame it somewhat differently. I think money is a means by which one projects one's speech, amplifies one's speech beyond the sound of your voice.

Mr. LUNGREN. Let me put it this way, isn't one of the conclusions of that interpretation of the Constitution that, for instance, Steve

Forbes was unable to contribute whatever amount of money he wanted to to Jack Kemp when Jack Kemp ran for President in 1988, and short of that, then Steve Forbes became a candidate. Maybe it is a rhetorical question, but I will ask it anyway: Why was the country better served by having Steve Forbes who, while he supported the same positions Jack Kemp did, was certainly not as good a presidential candidate, why is the country better off that the person who is clearly not a viable presidential candidate is able to spend his money, as long as he is the candidate, but somehow we corrupt the system if he gave the money to a Jack Kemp, who has the same ideas but would have been a much better candidate but didn't have the resources? That is a question I have tried to figure out in my own mind. Maybe I am biased on it because I happened to be part of Jack's campaign and I thought it was a terrible tragedy that he wasn't able to sustain it. But sometimes I just wonder whether we are looking for answers to the question of corruption in the wrong places. I just—I find it hard to believe that we are better off with Jack Kemp not being able to compete in that campaign because frankly we couldn't raise the money for it and Steve Forbes, a genuinely nice man who had the same views, could use his own money but was not nearly as good a candidate. Those are the kinds of real life consequences that would bother me when we theoretically think about how we are going to sort of set the system up so that we make sure the corruption is not here. And yet we still have the first amendment which we have always said allows you to use your money to express your point of view.

A rhetorical question, but it is one that I grapple with all the time in looking at these issues. I respect all of your opinions here, I may disagree with some of them, but these are thorny issues that are important issues because it really does go to the question of how do we have earnest and active and robust debate and maybe disclosure?

And lastly, I would just say I would hope that others would think about the idea of allowing more cooperation and coordination from the parties to the candidates, because frankly I think that is one of the answers to these other issues that are out there. I would rather be held responsible for my views in my campaign. I would rather my party be held responsible. And if we could work together, then the people know what my message is and what my party's message is. If we coordinate it, that is so much the better.

Anyway, thank you for your suggestions there. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Ms. Lofgren.

Ms. LOFGREN. Well, thank you, Mr. Chairman. And Mr. Lungren, you and I don't agree on everything but I think the idea that parties are so constrained is really something we ought to talk further about, because I am not sure that is good for the American system at all. And I am not exactly sure how to deal with it, but I think it deserves some future discussion and I think maybe we can do something together on that.

Ms. Torres, I particularly found your testimony helpful because I have been thinking, clearly we have got some work to do, I think, on the disclosure end and several of the witnesses mentioned that,

and I think we need to think through what that is exactly. I mean the Court mentioned the immediacy of technology. And you can—if you make a contribution, there is not a reason in the world you can't have the fact of that contribution on your Web site within the hour. I mean it is easy to do. And so since it is easy to do, maybe there ought to be a requirement to do that.

But I am looking at your testimony. On page 4 you say since shareholder money is at stake, shareholders deserve more say about whether that money is spent on political contributions and expenditures, and note that there is a process in Britain to do that. But Britain doesn't have a first amendment and I am looking at the Court's opinion, Justice Kennedy, on page 55 of the Supreme Court draft. At the end of that paragraph he says, the first amendment protects political speech and disclosure permits citizens and shareholders to react to the speech of corporate entities and shareholders—of corporate entities in a proper way. And from that I think he refers to the first sentence in that same paragraph about corporate democracy being the proper way. And that makes me think about really that the Court is envisioning a reaction rather than a prospective approval, although they don't say so directly. And it also makes me think that we should examine corporate democracy, because if they are saying that is where shareholder remedies are if they are agreed then we ought to look at what can a shareholder do retroactively, and the answer in most cases is nothing.

And so I am wondering in your opinion if we enhance disclosure, so for example, I am Good Smelling Soap Corporation and I decide that I am going to spend, you know, 3 percent of my profit this year campaigning against Mr. Capuano because I think that he is dirty and I am a soap guy, right? I am just making this up as I go along. My shareholders are aggrieved, but what can they do about it? Nothing. If I engage in activity that triggers disclosure, should then shareholders have additional rights under corporate democracy to hold officers and directors accountable in some way for profitability or for failure to disclose or for other things? Would that be a burden on the First Amendment in your judgment?

Ms. TORRES-PELLISCY. I do not think that giving shareholders the ability to consent to political expenditures is implicated by the First Amendment. I think this is a question of using other people's money in a way in which they have had no say. And so I think it is good corporate governance and it is good for our democracy to change the securities laws to give shareholders more meaningful rights.

What I find so interesting about Kennedy's opinion is that he seems to believe that shareholders already have these rights.

Ms. LOFGREN. That is right.

Ms. TORRES-PELLISCY. And I think that is an invitation, an opening for Congress, that he is not against shareholders exercising control over management's spending in politics.

Ms. LOFGREN. Let me ask you this, the business judgment doctrine really protects officers, and you reference that in your testimony, from any kind of breach obligation, but those business judgments tend to—they relate to running a business, whereas political speech generally has been held to be in a different sphere. Should

we directly repeal or modify the business judgment doctrine when it comes to speech that triggers disclosure? And again, would that, do you think, be an improper burden on exercise of First Amendment rights by the corporation?

Ms. TORRES-SPELLISCY. Yeah—I mean, business judgment is usually—it is something that State courts use to be deferential to how corporate managers manage the day-to-day workings of a business. So I actually haven't wrapped my head around how Congress could change the business judgment rule, which tends to be exercised by State court judges.

Ms. LOFGREN. That goes to my next question, if I may, because we do generally have the ability to regulate corporations under the Commerce Clause. We regulate to the Securities and Exchange Commission. So clearly it seems to me we would have the ability to create certain Federal requirements, at least for those companies that are regulated by the Securities and Exchange Commission.

Ms. Hayward has mentioned several times closely held corporations, and the Court itself criticized the regulatory scheme as not making distinctions between different corporate entities, and I think there is some truth to some of that. For example, if the corporation is just me, obviously I should not have to go ask myself permission.

On the other hand, I represent Silicon Valley and there are plenty of people who are working for a corporation that hasn't gone public yet, but their entire future net worth is in stock options or stock that they can't sell because it is not publicly traded. In fact, they may be at a greater disadvantage than a publicly traded corporation for somebody who engages in speech and puts everything they worked for at jeopardy.

And so I am wondering in terms of litigation, the *Cort v. Ash* case that you reference, again it is not a Federal issue, but it could become a Federal issue, whether there is a need to provide in cases where activity triggers disclosure some remedy for shareholders if shares are damaged in some way or the trademark is diluted. I am not sure what all the details would be—and that would give—I am thinking aloud, but that would give protection to shareholders even when there has not been an IPO, and arguably whether you are even more at risk because you can't sell your stock. And yet for the corporation that has one shareholder, you obviously would never sue yourself, so it wouldn't invite those kinds of abuses. Do you think that would run afoul of the First Amendment?

Ms. TORRES-SPELLISCY. I do not. And *Cort v. Ash* is a very interesting case because this is when the corporate ban was in effect and a corporation arguably violated the ban, a shareholder tried to sue under FECA and the Court said no, there is not a private right of action under FECA. Even though the corporation is violating FECA, you as a shareholder don't have a right to enforce that. And so part of what you might look at is where do you create those private rights of action.

Ms. LOFGREN. And only when the—I am just thinking when you engage activity that triggers a new disclosure activity, then you might have a different set of rules to protect shareholders. I will just ask one more question because I know others want to speak.

On Sub S corporations and some others, I am looking at will you spend—when we give benefits to corporations, tax benefits, and again this is a question do you think this would be an unfair burden on First Amendment exercise. If a certain percentage of your revenue or your value is expended in activity that must—that triggers disclosure, would that that be—we might then question is this really a corporation that deserves the benefit of the corporate code or is it really just a shell to get tax benefits for political speech and whether at some level you say okay, we are going to trigger, you are no longer really legitimately a corporation. You are really just trying to get the taxpayers to subsidize your political activity and we are not going to give you those corporate tax benefits anymore. Do you think that would be an unfair burden on the First Amendment?

Ms. TORRES-SPELLISCY. I think the difficulty, and one of the proposals I have seen floating around, is basically you would say in, say, the State of Delaware, if you conduct independent expenditures then you cannot get a Delaware corporate charter. I think that probably goes too far and you—

Ms. LOFGREN. I think so, too.

Ms. TORRES-SPELLISCY. Yes, because Citizens United is Citizens United, it says that corporations have free speech rights and so I don't think you could take that away—

Ms. LOFGREN. What I am asking you is not do they have free speech rights, they do, the Court already told us that. The question is do they have tax benefit rights? And at what point does that—we are giving corporations tax benefits for a public purpose, which is to engage in economic activity and that creates wealth for the Nation and the like. We are not really giving those tax benefits to run political campaigns. Where is that line drawn and does that run afoul of the First Amendment?

TORRES-SPELLISCY. Under IRC, I think it is 162(e), contributions and other political expenditures are already not tax deductible for corporations. So the Tax Code does speak to some of those issues.

Ms. LOFGREN. But the independent expenditures, we are in a whole new world.

Ms. TORRES-SPELLISCY. Yes.

Ms. LOFGREN. Mr. Chairman, thank you for your indulgence in letting me ask these questions.

The CHAIRMAN. Thank you. We are going to have votes at 4 o'clock. They are the last votes of the day. I would like to try to get this done and adjourn rather than bring everybody back here again. I mean, I will come back if you will come back, but sometimes my colleagues don't always join us. So if they would be a little short I would appreciate you getting to the pertinent questions.

Mr. McCarthy.

Mr. MCCARTHY. Before I begin, Mr. Chairman, I want to thank you in the style in which you are holding this hearing. The freedom that you allowed the speakers to go longer is very productive for all of us, even on the questioning. I understand we are going to have quite a few hearings on this as we go forward. And I appreciate the style in which you are holding it.

If we are going to be studying this, let's analyze what the case actually said and, Ms. Hayward, you said the Court came down



and it didn't change the status of the corporation under the First Amendment but it allowed a corporation and a union to change from an issue ad to a direct ad. So maybe you could explain a little of that so we are all on the same page.

Ms. HAYWARD. Okay, the way I see it, what Citizens United did was say explicitly what the Court had been sort of hinting around in a series of cases, Austin being the notable exception, that it was focusing more on the independent expenditure quality of activity than the identity of the speaker. And so independent expenditures received full First Amendment protection, which means they get strict scrutiny and States have to have a compelling state interest and use the least restrictive means to restrict independent expenditures. The wholesale corporate expenditure ban doesn't fly under that test. I think that is a reasonable continuation from prior cases.

Mr. MCCARTHY. If I could be quick. So an issue ad from a direct ad, would I be wrong in saying it is changing three words at the end of the ad to calling somebody to either voting for or opposing?

Ms. HAYWARD. Quite possibly.

Mr. MCCARTHY. And there would be the timing, either 60-day or up to the election. Is that why you come to the conclusion, Mr. Simpson, that there won't be that much more money different in this campaign spent by corporations? Because they can already spend it, it is the timing of when you spend it or a union in that matter?

Mr. SIMPSON. That is a large part of the reason, yes. The other part is that we can look to States like California and other States and it is not as though corporate speech has overtaken their elections. Before we decide that the sky is falling from this, we might want to actually look at the States that allow corporate independent expenditures and these other things. And I think if we do we will see that corporations have not spent jillions of dollars in those States.

Mr. MCCARTHY. I come from California and they allow it in the State house. President Obama was a representative in Illinois and they allowed it. Chris Van Hollen from Maryland, they allowed it as well. So we have seen this play.

I want to go back to Mr. Lenhard. With this Court case, can a corporation give money to a Member of Congress. Has that changed at all?

Mr. LENHARD. No, it has not.

Mr. MCCARTHY. You said, I think it was in the questioning with Mr. Lungren—no, no, with Chairman Brady—that between a union and a corporation you were concerned because the corporations were so much larger in scope playing politically?

Mr. LENHARD. No, I think what I was trying to say is that it was possible to distinguish them because the potential pool of resources was so much larger.

Mr. MCCARTHY. Do you know off the top of your head who has the largest political PAC in the country, who is the most active?

Mr. LENHARD. Yeah, the largest political PAC—I am not sure. Certainly the labor—the largest—labor union PACs are among the largest PACs in the country.

Mr. MCCARTHY. Does their money go 50/50 both parties?

Mr. LENHARD. No, I think that they give more money to Democrats than Republicans. I am not sure if you looked at overall, the accumulation of all PAC spending. My guess is that if you looked at all PAC spending it probably went to whichever party was in the majority.

Mr. MCCARTHY. I just checked OpenSecrets, and you are right. Operating Engineers are the largest, which is a union, they do 80 percent. The second is a corporation, AT&T, they do 50/50. And the third largest is International Brotherhood, a union, and they do 99 percent. The next is a corporation, Honeywell, and they do 61 percent to Democrats.

It made me think again on the questioning of Ms. Lofgren to Ms. Torres here, when you are asking that last question there that somehow corporations get some type of tax benefit so you would have to look at it. Could you not make that same argument, when we were talking here about health care and the way unions' health care was treated, if that bill that got the deal in the Senate would be to pass, would the unions not have a special tax incentive for their union members in health care and would that not give them a greater advantage because they wouldn't be taxed on it so they would have more money to play politically; could you make that argument?

Ms. TORRES-SPELLISCY. You could make all sorts of arguments. I am not a tax attorney, and so—

Mr. MCCARTHY. Well, she was asking you tax questions.

Ms. TORRES-SPELLISCY. Yes, I probably should have said that to her as well. So I just can't comment on the tax consequences of these things.

Mr. MCCARTHY. Last question. You did the study, Ms. Torres, on the concern that you said for the shareholders. And you weren't talking about the big wealthy shareholders, you were talking about so many of us who invest each month in our 401(k)s and others, and you thought there had to be a change. If that change would take place that we had to approve, would that be an opt-in or an opt-out?

Ms. TORRES-SPELLISCY. What we are proposing is an up or down vote. So the company would propose a political budget, we are going to spend a million dollars and then a line on the proxy that goes to the shareholder would say do you want corporation X to spend a million dollars in the coming year, yes or no. So if you want to look at that as an opt-in, then—

Mr. MCCARTHY. Since the Court case dealt with corporations and unions, would you not ask the same question of the union so that union member that is middle class that is getting money taken out but has to opt out for it, would it not be the same question to them as well; if you were crafting a legislation would you not want that?

Ms. TORRES-SPELLISCY. As I said earlier, we haven't really looked at the union question.

Mr. MCCARTHY. But would it be fair and in the same plane so if we did craft legislation and a corporation was asked that to a shareholder, wouldn't that same American that is a union worker have the same because they will probably be shareholders too? So you would probably agree with the statement that we should do the same for both?

Ms. TORRES-SPELLISCY. I will decline to agree with you at this point.

Mr. MCCARTHY. So we should treat them differently? They are different people?

Ms. TORRES-SPELLISCY. I honestly would rather do some thoughtful study and then give written testimony to the committee.

[The information follows:]

Mr. MCCARTHY. Their money must be different. Okay, I yield.

The CHAIRMAN. Mr. Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman. Mr. Chairman, I will be brief because I know we have to go vote. I got to tell you, after listening to most of this discussion I really wish I had paid more attention to corporate law. All I remember from corporate law is you are supposed to borrow somebody else's money, make a profit and keep both. That is all I remember from corporate law.

Mr. LUNGREN. Law school?

Mr. CAPUANO. No, it was run by Jesuits as a matter of fact.

Mr. Chairman, I don't approach it through the technicalities of everything and that is why I don't really have any questions. I am looking forward to working with people on this panel.

The question I have for everybody, and it is how I come to the issue, is what is it that I want? What is the goal that I want? I am not looking to thread a needle with a constitutional issue, I am not looking to parse this out. What I really want, I really want upfront, straightforward elections. I want everybody out of the elections except the voters and the candidates. If I could, I would have no money at all for anybody. I mean maybe a few dollars for some literature so people can get educated, and that is it. A level playing field.

Everybody says you need millions of dollars to run for Congress. Why? The only reason you need it is because the other guy has it. If the other guy doesn't have it, you don't need it. Elections should be decided by regular people, getting rid of all the extraneous material.

Now I know that that is a dream and I know I can't get there. My goal is to try to find ways with the stupid laws and stupid legal decisions we have. How do I get through all of that to get as close to that ideal that I want—I know that others don't share it—as possible. And that is all I want to do.

So I am asking the panel, not necessarily today, we don't have time today, and I am asking members of this committee to try to come up with what is it that you want? I am not looking for Democrats to win or Republicans to win. I know that you don't believe me, and that is fine. I am not. I am looking for voters to make honest, open, unfettered decisions. Not based on who has more money, not based on who is part of the political machine.

The last thing I would want is to bring the Democratic Party into my elections. Keep them out. I want the Republican Party in, please, get me a candidate. I want voters to decide on the basis of the people on the ballot. I do agree with not cluttering up the ballot. I totally agree I don't want public money going to fringe candidates. There is no question, but I think there are ways we can avoid that.

The truth is I don't really want public money. I just see it as the only alternative we have left available, as the best of a bunch of bad alternatives. What I want is voters to have the equal opportunity to hear the ideas of different candidates, from school committee to president, on a level playing field and make thoughtful decisions on that, which requires some involvement by voters. I wouldn't mind requiring them to come to debates. I don't know how you quite do that. Another court case, I am sure. But for me that is the goal and everything else is extraneous. And what we are doing today, I would argue, I am trying to find ways to get there.

And I would ask the panelists, again not today, I know we have to go vote, but you will be hearing from me in the next month or so. I would ask you to look at it with that goal in mind, how do I get there? How do I get as much of this nonsense out, not just corporate money. Corporate money happens to be the debate today. But I have no problem getting it all out so that we can have honest debates and honest elections and let the chips fall where they may. I am satisfied with that. That is all I want.

Mr. Lungren, I will tell you that what happened to you was wrong, and I would not have any problem at all making it illegal, clearly and unequivocally, but it is not the only dirty trick I have ever heard of. And it doesn't make it right. It is actually pretty easy compared to some of the stuff I know. But it doesn't make it right and it doesn't make it good for the voters. They should be able to come and vote as they please each and every election. So if there are ways to do that, I want to work with anybody who wants to do it, and without the partisanship as best I can, without the ideological answers. I want voters to decide. If they want to go to the hard right, I can say they are wrong, but it is okay with me, it is okay with me.

We just lost an election in Massachusetts. It is okay with me. We had a huge turnout for a January election. I was on the other side, we lost. But you know what, voters came out and voted it was okay with me. It was actually a pretty straight up election. That is what it should be about, and that is what I am here for. I am not here for money or no money or anything else.

And with that, Mr. Chairman, I apologize, but that is what I am asking. I am not asking a question today, I am asking you to think about it and help us through this, help me through this. Thank you.

The CHAIRMAN. Thank you, we have 3½ half minutes for a vote. Mr. Harper.

Mr. HARPER. I will be quick so Mr. Davis will have a moment, too.

Public financing of elections I think is not a good idea and a good road for us to go. But I would ask, if I could ask Mr. Lenhard, do you believe that the individual contribution limits should be done away with?

Mr. LENHARD. No. No, I think that there is certainly the potential, and in some cases actual corruption when people can give very, very, very large amounts of money to politicians. I think that that has underlain the restrictions and the law and the court's decisions for a long time. I don't think—there are politicians who are above that and it doesn't matter who gives them money and who

doesn't. But I think sometimes it does and at minimum the appearance of giving someone \$100,000 or \$600,000 would be corrupting or appear so.

Mr. HARPER. In light of what Ranking Member Lungren said about Jack Kemp and Steve Forbes and that race, there is somebody who can use all their individual money. Shouldn't this be about full disclosure so we know exactly where the money is coming from and who this is. Does anybody on the panel support doing away with the individual limits on campaign contributions with full disclosure? I would just be curious.

Mr. SIMPSON. I actually agree with Congressman Lungren to the extent that he laments the fact that people cannot finance candidates that they wish. I think that the answer to the problems on this committee is dealing with in the sense of corporations or other groups being able to outspend politicians. The answer is allow politicians to compete on the same basis. So I would do away with or raise them so that politicians can actually compete with all of the voices.

The CHAIRMAN. Two minutes to the next vote, 2 minutes.

Mr. DAVIS of Alabama. Thank you, Mr. Chairman. Thank you, Mr. Harper, for your courtesy in being brief. Obviously given the time constraints, I really only have time to make an observation to the two members of the panel who were supportive of the United decision. It seems a lot of the arguments frankly that you made, Mr. Simpson, were probably the very same arguments that were made prior to Buckley v. Valeo. Before Buckley v. Valeo it was not at all taken for granted that contributions could be capped. A number of the points you made about the first amendment were made by the people who argued for striking down the caps on contributions during Buckley v. Valeo. But if memory serves me correctly the Court's logic was that in the context of speech if there was a compelling enough public interest in reining in speech, that the Court could impose caps and could impose limits.

So I would just end with this observation. Right now if a Member of Congress sits down with a corporation, there is a difference of opinion on issue, the most a corporation can implicitly say to you is I won't write you a check or I will write a check to your opponent and they will limit it to the tune of whatever the limits are in their PAC, \$5,000 per cycle. Candidly that is not much of a threat in the modern context of campaigns. It would seem that after this decision the worst that a corporation can say to a Member ratchets up considerably: If you don't vote with me I will put a million dollars into defeating you in the next election. I can't imagine a greater threat to independent decision making by this body than corporations implicitly or explicitly being able to say if you don't follow my line, I will single-handedly put enough resources into that contest to defeat you.

The CHAIRMAN. Zero time, sir.

Mr. DAVIS of Alabama. All right.

The CHAIRMAN. I don't want to cut you off, but I don't want you to miss the vote either. Thank you all. We really appreciate you being here and it was very, very enlightening. Thank you for your testimony. I am sure we will be hearing more from you; you will be hearing more from us.

I ask unanimous consent that the following statements be part of the hearing record, statements by the Campaign Legal Center, statements by the People for the American Way, statements by SEIU, statements by U.S. PIRG, statements by the President of UAW and the President of the Communications Workers of America, and an article published by the Brookings Institution. I ask the record be left open for 5 days to accept testimony from others.

[The statement of the Campaign Legal Center follows:]



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February 2, 2010

The Hon. Robert A. Brady  
 Chair, Committee on House Administration  
 1309 Longworth Building  
 Washington, DC 20515

Dear Chairman Brady:

The Campaign Legal Center is pleased that the House Committee on House Administration will hold a hearing on the effect of the U.S. Supreme Court's decision in *Citizens United v. FEC*. We appreciate the opportunity to share with the Committee our thoughts regarding appropriate legislative responses to the Court's decision, which we regard as an extreme example of radical judicial overreach that arbitrarily overturns decades of precedent, and undercuts the ability of the legislative branch to regulate elections. We respectfully request that this letter and the accompanying attachment be included in the official record of the Committee on House Administration.

As you know, the 5-4 decision in *Citizens United* struck down the 60-year-old federal restriction on corporate expenditures in candidate elections. To reach this holding, the majority opinion written by Justice Kennedy effectively overruled three earlier Supreme Court decisions that upheld the constitutionality of restrictions on corporate expenditures: part of *McConnell v. FEC* (2003), *Austin v. Michigan Chamber of Commerce* (1990); and *WRTL v. FEC* (2007). Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. Eight of the Court's nine justices, however, joined in upholding the electioneering communications disclosure provisions that were enacted as a part of the Bipartisan Campaign Reform Act (BCRA).

The *Citizens United* case began as a challenge to BCRA's "electioneering communications" corporate funding restriction and disclosure requirements as applied to plaintiff's film entitled *Hillary: The Movie* and its advertisements promoting the film. On July 18, 2008, the district court granted the FEC's motion for summary judgment, holding that the film was the "functional equivalent of express advocacy" and therefore could be constitutionally subject to corporate funding restrictions. *Citizens United* appealed to the Supreme Court.

In its opening brief filed with the Court, *Citizens United* first argued that the Court's 1990 decision in *Austin v. Michigan State Chamber of Commerce* should be overruled. Instead of deciding the case on statutory grounds or on narrow constitutional grounds, the Court, on June 29, 2009, took the rare step of ordering re-argument on the question of whether the Court should overrule its past decisions affirming the constitutionality of restrictions on corporate electoral expenditures. After hearing oral argument on this broader question on September 9, 2009, the Court rendered its decision.

REPRESENTING THE PUBLIC INTEREST IN ENFORCEMENT OF CAMPAIGN LAW

The Legal Center filed two *amici* briefs—on June 29 and July 31, 2009—with the Court, and previously had filed an *amicus* brief with the district court on June 6, 2008.

By empowering corporations to use their enormous wealth and urge the election or defeat of federal candidates, what the Court majority did in *Citizens United* was to unleash unprecedented amounts of corporate “influence-seeking” money on our elections and create unprecedented opportunities for corporate “influence-buying” corruption. This corporate cash will buy even more power over the legislative process and government decision making. As a result of this decision, for-profit corporations and industries will be able to threaten members of Congress with negative ads if they vote against corporate interests, and to spend tens of millions of dollars on campaign ads to “punish” those who do not “knuckle under” to their lobbying threats.

More than a century’s worth of federal and state laws and policies restricting corporate campaign activity in federal elections has been undermined by the Court’s irresponsible decision in *Citizens United*. What makes this glaring case of radical judicial activism even more striking is the fact that the Court chose to decide this case contrary to its own settled principles of *stare decisis*. As Chief Justice John Roberts testified in his confirmation hearings:

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the court has emphasized this on several occasions—it is not enough that you may think the prior decision was wrongly decided. That really doesn’t answer the question, it just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.<sup>1</sup>

Unfortunately, the Chief Justice and the other four Justices who comprised the majority in *Citizens United* failed to apply these factors in this case. After all, the *Citizens United* decision immediately de-stabilized the law, not only because the Court overturned decades of laws restricting corporate spending in our elections, but it also effectively invalidated or cast doubt regarding state election laws in over twenty states where corporate spending is restricted. These circumstances certainly had created an atmosphere of “settled expectations” that corporate spending restrictions would remain in place. That is especially true since the Court upheld those restrictions in the 2003 *McConnell* decision and refused to strike them down in the 2007 *WRTL* decision. Moreover, the restrictions on corporate spending had not proven to be unworkable or “eroded by subsequent developments.”

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<sup>1</sup> Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, S. Hearing. 109-158, Serial No. J-109-37, p. 144 (2005); Available at: <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>

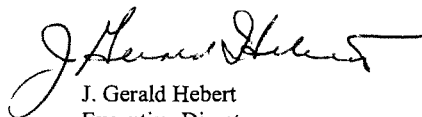


Most irresponsibly, the narrow Court majority chose to take this radical step without even the benefit of a record from the lower courts, and in a case where there were several opportunities to decide the issues without overturning Acts of Congress or its own precedents. This case has all the hallmarks of the very judicial activism that conservatives usually criticize. Lacking an even vaguely authoritative set of facts in the case, the Court chose to act not upon relevant facts in a fully developed record, but rather based on its gut instinct in a gesture of disturbing condescension toward Congress and the American people. In this case, five Justices assumed the role of legislators, and actively reached out to decide matters better left to the expertise of Congress. The fact that they used the First Amendment as constitutional cover for their policy decision that corporate America has the same free speech rights as ordinary citizens only deepens the perversion of this ruling.

Given this outcome, it is critical that Congress move expeditiously to mitigate the damage inflicted by this decision. Attached is a list of areas the Legal Center has identified that Congress should consider as it attempts to limit the damage to our democracy caused by this decision. We encourage this Committee to move quickly to put together a package of reforms and to ensure that the dangers presented by *Citizens United* are dealt with effectively.

The Campaign Legal Center looks forward to the hearings and stands ready to be of assistance as the Committee considers specific legislation.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Gerald Hebert", with a stylized flourish at the end.

J. Gerald Hebert  
Executive Director

Attachment



## A LEGISLATIVE RESPONSE TO *CITIZENS UNITED*

The astonishing and radical outcome of the *Citizens United* case has opened new and troubling venues for a flood of special-interest money to pour into elections at all levels of government. The decision did not leave much room to repair the damage it will cause. But some actions can and should be taken immediately at the federal level—before the mid-term elections—to mitigate the damage the decision could bring.

Below is a list of issues that Congressional leaders should consider when putting together a legislative response package.

- **Strengthen Statutory Language on What Constitutes Coordination**  
The Supreme Court's view in *Citizens United* that corporate expenditures would not corrupt federal elections hinged on its view that the expenditures would be made "independently" of candidates and political parties. Current Federal Election Commission (FEC) regulations defining what constitutes coordinated vs. independent expenditures are very narrow and too weak. Past FEC efforts to write coordination regulations have been rejected twice by courts as insufficient. There was an effort during consideration of the Bipartisan Campaign Reform Act (BCRA) to strengthen the statutory definition. That effort should be revived immediately. Congress should enact statutory restrictions defining coordination, especially since the FEC has shown itself incapable of writing them.
- **Enact Ways to Provide Candidates Sufficient Access to the Publicly Owned Airwaves**  
Before the recent ruling, candidates faced the daunting prospect of raising large amounts of money to purchase time on the publicly-owned airwaves simply to communicate their message to voters. With corporations—and unions—now allowed to use treasury funds to run advertisements seeking to influence election outcomes, the problem has become worse. Candidates will need resources to help ensure that voters can hear their message and judge for themselves the relative value of a candidate. Over time, the statute that requires broadcasters to provide candidates the opportunity to purchase time at the lowest unit rate (also called lowest unit charge) has become severely weakened. Air time sold at the lowest unit rate is generally pre-emptible, thus forcing candidates to buy the more expensive, non-pre-emptible time to

ensure they reach the targeted demographic. A new statute should ensure that once again the lowest unit rates for candidates are meaningful. In the longer term, Congress should consider providing candidates with broadcast vouchers to match small-dollar contributions. In addition, the Federal Communications Commission (FCC) should, as part of their on-going proceedings on public interest obligations of digital broadcasters, also look at ways to ensure that candidates have access to the publicly-owned airwaves so their messages are not drowned out by a political cacophony among many special interest players.

➤ **Strengthen Shareholder Protections to Ensure Accountability**

Corporate shareholders have a right to know how that corporation is spending its treasury funds. To improve accountability, corporations should be required to disclose more information about their expenses that are not deductible as a business expense under IRC 162, *i.e.* political activities. Also, corporate entities whose major activity is influencing elections should be regulated as “political committees” under federal campaign finance laws. The FEC has in recent years refused to regulate many such groups as political committees. Federal statutes should be strengthened to require regulation by the FEC.

➤ **Strengthen Requirements for Disclosure of Corporate Spending for Political Purposes**

A major concern raised by *Citizens United* is that corporations will evade disclosure of their electoral spending by laundering money through third-party organizations, such as a chamber of commerce. The Court, by a vote of 8-1, upheld the electioneering communications disclosure requirement. However, the FEC has already weakened this disclosure requirement by requiring third-party organizations to disclose only those donors that specifically designate their contributions for the organization’s electioneering communications. The FEC rules thus create a roadmap for evasion of the law. Legislation should ensure that *all* sources of funds used by third-party groups for electoral spending are disclosed, especially any spending for advertising in mass media.

➤ **Revise Statutes Dealing with Disclosure of “Electioneering Communications”**

Current law requires disclosure of any broadcast, cable or satellite advertisement that: (1) references a clearly-identified federal candidate, (2) is targeted to the relevant electorate, and (3) is aired 30 days before a primary election and 60 days before a general election. Once a person or group spends over \$10,000 in a year for electioneering communications, they must report to the FEC, including disclosing all their donors who contributed \$1,000 or more to fund the ads. Now that corporate independent expenditures are permissible, there is no need for these narrow 30- and 60-day windows. Any

electioneering communication should be disclosed whenever it occurs. Also, current law requires that independent expenditures be reported to the FEC in a filing with a statement certifying that the expenditure was not coordinated with any candidate or party. Electioneering communication disclosures should also include this same self-certification.

➤ **Strengthen Pay-to-Play Restrictions for Government Contractors**

Current law prohibits federal contractors from directly or indirectly making any contribution of money or other things of value to any political party, committee, or candidate. A new statute, based on the same constitutional rationale as the Hatch Act, should prohibit corporate federal contractors from making independent expenditures in support of or opposition to federal candidates. Other pay-to-play restrictions (*e.g.*, hiring of lobbyists and certain types of corporations such as public utility companies) should also receive consideration.

➤ **Ensure that Corporate Independent Expenditures Do Not Become a Means to Evade Current Statutory Restrictions on Foreign Nationals' Roles in U.S. Elections**

In the aftermath of this decision, Congress should review the law to ensure that foreign controlled funds do not enter U.S. elections as a result of the *Citizens United* case. The FEC currently has rules governing the role of U.S. subsidiaries of foreign-owned companies that prohibit foreign funds being spent by U.S. corporations in U.S. elections, and forbid the involvement by foreign nationals in the decision-making process about such political spending. Congress should ensure that these rules are being adhered to, and can be enforced. Congress should also look at laws in states such as Hawaii that have dealt with the issues of foreign nationals.

**Dangers to be Avoided in a Legislative Response: What NOT to Do**

➤ **Do not reopen the soft money loophole for parties**

With the prospect of corporations making large independent expenditures, there is pressure to reopen the soft money loophole to allow political parties to accept unlimited corporate and union treasury funds which can be spent in a variety of ways to impact the outcomes of targeted races. But the answer to the potential influx of corporate spending is not to encourage more potential corruption. The extensive record in *McConnell v. FEC*, as well as the U.S. Supreme Court decision upholding BCRA, clearly demonstrated the corrupting influence of soft money contributions. That disturbing record should not be repeated by reopening the loophole.

➤ **Do not significantly increase contribution limits to candidates and parties**

Another reaction that has surfaced in the wake of *Citizens United* is to allow candidates and parties to accept significantly larger contributions. The U.S. Supreme Court has upheld contribution limits as established by Congress as a

legitimate and constitutional means to fight corruption and the appearance of corruption. Significantly increasing those limits will allow even greater influence-buying and influence-seeking access.

#### **What About Public Financing?**

Public financing remains an attractive alternative to financing modern federal campaigns. However, the *Citizens United* ruling will require supporters of public financing to attract candidates to participate in such a system when they fear facing large independent expenditures by a corporation or union — potentially late-in-the-election cycle when there is little opportunity to offset the disadvantage. Previous public financing models relied on triggers to allow participating candidates to get larger matches or accept larger contributions if they faced such expenditures. But the Roberts Court, in *Davis v. FEC*, cast doubt on the constitutionality of such triggers.

The public financing measures introduced this Congress by Senator Dick Durbin (D-IL) and Representative John Larson (D-CT), as well as a new proposal put forth by the Campaign Finance Institute, avoid this potential constitutional problem. Yet, these proposals face an uphill battle to pass in the current fiscal and political environment in Congress. In addition, some candidates may have concerns about whether they will have the ability and time to raise sufficient funds to respond effectively to late-cycle corporate or union independent expenditures in the wake of *Citizens United*.

#### **What About a Constitutional Amendment?**

Proposals for a constitutional amendment to override the Court's ruling in *Citizens United* are likely to be introduced in Congress as well. Among the forms these proposals could take include targeting the issue of treating a corporation as a person/individual, or restricting the ability of corporations to use their treasury funds for electioneering activities. The path to ratification for a constitutional amendment is very long and difficult. Also, there are many people who may disagree with the Court's ruling who are uncomfortable with altering the First Amendment. In the meantime, there are important steps to be taken to mitigate the damage caused by the opinion, and to muster the political support to fight off attempts in Congress to cause further erosion of laws that protect against corruption and the appearance of corruption, as well as access- and influence-buying.

[The statement of People for the American Way follows:]



February 1, 2010

The Honorable Robert Brady, Chairman  
The Honorable Dan Lungren, Ranking Member  
Committee on House Administration  
1309 Longworth House Office Building  
Washington, DC 20515

Re: Submission to Committee on House Administration for Record of the Hearing, February 3, 2010, "Defining the Future of Campaign Finance in an Age of Supreme Court Activism"

Dear Chairman Brady and Ranking Member Lungren:

On Thursday, January 21, in the case of *Citizens United v. FEC*, 2010 U.S. LEXIS 766, involving Section 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), the U.S. Supreme Court in a 5-4 decision made a radical about-face and reversed long-standing precedent that had previously upheld the constitutionality of the federal law that restricts independent corporate spending in elections.<sup>1</sup>

In the majority opinion written by Justice Kennedy, the Court reversed its decades-old decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a Michigan state law's restriction on the independent expenditure of funds from a corporation's general treasury for political speech. Essentially, the Court ruled that governmental restrictions on corporate spending in elections are invalid and unconstitutional<sup>2</sup> and declared for the first time that "the Government may not suppress political speech on the basis of the speaker's corporate identity" and "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United* at \*93.

The underlying premise of the majority's long-awaited opinion is, simply put, an astounding and outrageous new principle of law: Corporations – which are artificial creations of state law designed solely for economic purposes – are guaranteed the same free speech rights as real people under the First Amendment. Justice Stevens' dissent in the case, which will likely be quoted for decades to come, is the most succinct and scathing refutation of that premise:

"In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters."

<sup>1</sup> As amended by § 203 of BCRA, § 441b prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. 2 U.S.C. § 441b.

<sup>2</sup> Although Kennedy's majority opinion suggests an exception for extending its decision to invalidate the direct contribution ban on corporations, the *Citizens United* Court's rationale for holding restrictions on corporate independent expenditures unconstitutional could likely be used to invalidate the ban on direct contributions to candidates by corporations, which is the only remaining restriction, other than disclosure requirements, on election-related corporate spending. See *Citizens United* at \*60.

*Id.* at \*143. Stevens also pointed out that the Framers “had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” *Id.* at \*205.

Yet despite the undeniable truth of Justice Stevens’ arguments, the majority resolutely set down a new interpretation of the Constitution that perverts the First Amendment and opens the door to millions of dollars of corporate special interest money in our elections. A corporation’s CEOs and management are now free to spend funds from its general treasury to support or oppose any candidate that they believe will affect the profitability of the company. The amount of corporate spending allowed in elections as a result of the *Citizens United* decision is now quite literally unchecked, and, given their overwhelming financial resources, the public debate on the fitness or suitability of any particular candidate may now be drowned out by the bottomless pockets of big business.

The threat to this country’s democracy cannot be overstated. On behalf of hundreds of thousands of members across this nation, People For the American Way (PFAW) calls on Congress to fix the damage done by an ideological majority of the Court.

First, Congress should enact legislation to minimize the most flagrant effects of the *Citizens United* decision. For example, the majority’s conclusion that Government may not regulate political speech regardless of the identity of the speaker, has opened the door to foreign influence in our elections,<sup>3</sup> a matter that previously had been fully foreclosed by federal laws.<sup>4</sup> To that end, PFAW supports the American Elections Act of 2010 introduced by Senator Al Franken (S. 2959), which, among other things, would ban election contributions and spending by corporations that are controlled or highly influenced by foreign nationals, including foreign governments, companies and persons.

In addition, PFAW supports the Fair Elections Now Act, introduced by Senator Durbin (S. 752) and Representative Larson (H.R. 1826), which seeks to address the amount of money raised in federal elections from large donors and special interests. Specifically, the Fair Elections Now Act would enact public financing of federal elections and give candidates the option to run for office on a mixture of small contributions and limited public funds. This process would highly incentivize grassroots fundraising and help candidates run highly competitive campaigns without relying on large contributions from corporate special interests.

PFAW also supports other efforts to limit corporate political spending through legislation requiring shareholder approval of political expenditures, more stringent disclosure requirements and restrictions on the ability of corporations who receive federal contracts, bailout monies, or the benefit of any other public resource to engage in political spending in federal elections. We urge Congress to explore these and other options.

However, these statutory fixes will do little to restore the First Amendment to what was intended by the Framers and ultimately will be inadequate against the unfettered influx of corporate election

<sup>3</sup> Indeed, Justice Stevens recognized the threat when he wrote: “[The majority’s rationale] would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans. . .” *Id.* at \*198.

<sup>4</sup> Previously, BCRA prohibited, among other things, direct contributions by foreign nationals and indirect contributions in the form of independent expenditures by corporations in federal elections. Although the ban on direct contributions by foreign nationals remains in effect, because *Citizens United* now allows corporations to engage in unlimited independent expenditures in federal elections, foreign corporations with U.S. subsidiaries would now be able to do so as well. The *Citizens United* majority specifically declined to make an exception in its ruling for corporations controlled by foreign entities to close this loophole. *Id.* at \*88.



spending. For example, private equity firms with hundreds of millions of dollars at their disposal are not beholden to a group of shareholders and would still be free under *Citizens United* to spend an unlimited amount of money to change the outcome of our elections, as would many other companies. Only a constitutional amendment can restore the American people's authority to regulate corporate influence in our elections and restore our democracy.

As an organization dedicated to defending the Constitution and, especially, the First Amendment, we understand that a constitutional amendment is not an endeavor that is to be taken lightly or without great care to protect the rights and liberties of individual Americans. But the Supreme Court's decision to disregard the voice of the American people by invalidating restrictions on corporate spending in elections is such that a constitutional amendment is the only appropriate and direct response. In *Citizens United*, the Supreme Court has created a situation in which the free speech rights of individual Americans are degraded by the speech of companies. Although enacting a constitutional amendment is difficult, it is both necessary and achievable.

In the months and years to come, People For the American Way urges you to consider all the tools at your disposal, including a constitutional amendment, to correct the wrongs of the *Citizens United* decision and ensure that ours is truly a government of, by and for the people.

Very truly yours,



Michael B. Keegan  
President

[The statement of SEIU follows:]



ANDREW L. STERN  
International President

ANNA BURGER  
International Secretary-Treasurer

MITCH ACKERMAN  
Executive Vice President

MARY KAY HENRY  
Executive Vice President

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Statement of Anna Burger, International Secretary-Treasurer,  
Service Employees International Union on the *Citizens United*  
Decision

Corporate executives are on a roll, and the rest of us are paying a steep price. The most recent case in point is the Supreme Court's decision in *Citizens United*, which has overturned a century of federal law, and the law in half of the states, and given the green light to unlimited corporate spending on political campaigns. What this means is that corporate CEOs are now free to raid the corporate till at will and spend their shareholders' money to advance a personal and corporate political agenda which has seen multi-million dollar bonuses for the select few, and continued unemployment, inadequate health care, and a host of other social ills for everyone else. Congress needs to act quickly to mitigate the harm caused by this decision.

The rules thrown out by the Supreme Court were hardly perfect, but they at least attempted to impose some accountability on the system. My own union provides a good example of how the rules were working. SEIU's 2.2 million members do not include corporate CEOs or bankers. Our members are nurses, janitors, government employees and other service employees. They want their voices heard, and they understand that the only way that is going to happen is if they act as a group. That is why SEIU, like most other unions, created what the law calls a Separate Segregated Fund, or a Political Action Committee, which allows our members voluntarily to contribute to an account for the specific purpose of engaging in politics. Let me stress: our independent expenditures are funded by *voluntary* contributions knowingly contributed to advance our members' political goals, and by law we solicit only our own members and administrative personnel to participate in the Fund.

Moreover, regulations require that we fully notify and advise our contributors, and the general public, of how we spend these voluntary contributions, and SEIU's PAC is proud to identify itself as the sponsor of its ads. The Supreme Court majority mocks these regulations as typical burdensome government regulations, but in the end of the day what they required is that people and groups report how they are spending their money.

Compare that to what corporations can do after *Citizens United*. Our member who voluntarily contributes \$5 out of her paycheck to SEIU's political action committee may also direct another \$5 to her 401K account for her retirement. Most of that money ends up in publicly traded stocks, which is to say it is indirectly funding publicly-traded corporations. When a CEO then chooses to make an independent political expenditure, he is using that \$5 or contributions like it. The difference between this contribution and the union member's voluntary PAC contribution could not be more stark: Unlike the union member, the stockholder has no interest in funding this political speech. Indeed, the stockholder has no way of even *knowing* she is funding this political speech. The corporation has no obligation to report to its shareholders that it intends to, or has, made this expenditure. Instead, massive amounts of money are collected by corporations for reasons wholly unrelated to the shareholders' political preferences, and then dumped into the political process with no accountability whatsoever.

This is not about citizens being able to act collectively, even through corporations. Shareholders already had the right to engage in politics through the corporations in which they own shares. Just like union members voluntarily contribute to union PACs, corporate shareholders contribute to corporate PACs. Indeed, during the last election cycle, corporations spent hundreds of millions of dollars through their PACs – more than unions were able to spend.

But the five activist judges on the Supreme Court evidently decided that the playing field needs to be substantially *more* tilted in favor of big money. Now corporations don't have to *ask* their shareholders to contribute to electoral politics. They can just take as much of their money as they want, without seeking their shareholders' permission, and without even telling their shareholders what they are doing. And that includes money from foreign shareholders that had no right to contribute to electoral politics under the law that was overturned by the Court. That's *Citizens United*.

The only fully adequate solution is to have it made clear that the First Amendment was never intended to give corporations the same free speech rights as living, breathing citizens. But we should not let the perfect be the enemy of the good. There are important steps that the Congress can and should take immediately to minimize the damage caused by *Citizens United*. We have proposed legislation to toughen up disclosure rules, so that corporate shareholders, and the public at large, know the details about how CEOs are raiding the corporate till to advance their personal political preferences. Better disclaimer rules, so that when corporations set up front groups to hide their true identity with anodyne names like "Citizens United," the public knows where the money supporting the ads is really coming from. And since the Court has said that shareholder democracy can assure that corporate money is not spent heedlessly, let's require

those corporations that choose to spend their shareholders' money on politics to adopt some democratic practices. Shareholders shouldn't have to support the political preferences of CEOs of companies in which they own stock, when they have no practical ability to stop that corporate spending. Corporations should not be the only "people" to have First Amendment rights. Congress should give shareholders a right to object to the funding of electoral politics through their stock ownership, and give them a refund to account for a corporation's political expenditures made over their objection. Finally, SEIU has long supported public financing of elections. These limited measures by themselves won't stop corporate money from overwhelming our political system. But they will at least restore some fairness to the political process after *Citizens United*.

We appreciate the opportunity to share our views with the Committee.

[The statement of U.S. PIRG follows:]



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February 3<sup>rd</sup>, 2010

The Honorable Robert A. Brady  
Chairman, House Administration Committee  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Brady and Ranking Member Lungren:

We write to offer our perspective on the House Administration's hearing, **"Defining the Future of Campaign Finance in an Age of Supreme Court Activism."** We ask that this letter be included in the record of the hearing.

In his 2010 State of the Union address, President Obama expressed his commitment to protecting the public from the egregious overreach made by the Supreme Court in *Citizens United v. FEC*. Now the burden falls to Congress to follow the administration's lead and act decisively to pass a legislative solution which will stop corporations from buying the next election.

*It is clear that the courts have left us room to do so, and do so in time to impact the 2010 elections.*

On January 21<sup>st</sup>, the Supreme Court turned our political system on its head with the Citizen's United decision. With a shocking lack of respect for judicial modesty and precedent, the court granted corporations virtually unfettered influence over federal elections.

In addition, in reaching this decision, the court not only turned back the clock on over 60 years of precedent, but also endowed corporations—artificial entities created by people for economic activity--the same right to influence campaigns as you and I.

A corporation is not, nor has it ever been, a person with voting rights. The idea that they can now channel their immense wealth to advocate directly for or against a federal candidate is abhorrent.

To put this in perspective, total spending on federal elections in 2008 was more than \$3 billion from political parties, outside groups, candidates, and PACs. While that is a lot of money, Exxon Corporation alone made over 45 Billion dollars in profit in 2008, which can now be directed at our federal candidates.

For any given Congressperson, the threat of tens of millions of dollars of attack ads will make it far more challenging to vote their conscience on the issues that matter to the public.

A strong package of statutory reforms as a practical short term solution to this problem is imperative. We ask that the members of this committee work to support and strengthen the legislative solutions bill which will be introduced shortly with the support of the administration.

The reforms we need immediately in the wake of this decision are *stronger disclosure laws, tough limits to the spending power of federal contractors and foreign corporations, required shareholder approval of political expenditures by corporations, and increased coordination limitations between party and corporate spending.*

Shareholders and the public have a right to know exactly how corporations are spending their funds to influence elections and causes, and should have to gather express approval of their individual public shareholders prior to spending political money. Foreign corporations, and those that take large amounts of government money, should not be allowed to influence elections at all.

Alaska PIRG • Arizona PIRG • California PIRG • Colorado PIRG • Connecticut PIRG • Florida PIRG • Georgia PIRG • Illinois PIRG • Indiana PIRG • Iowa PIRG • Maryland PIRG  
Massachusetts PIRG • PIRG in Michigan • Missouri PIRG • Montana PIRG • New Hampshire PIRG • New Jersey PIRG • New Mexico PIRG • New York PIRG  
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# **U.S. PIRG**

**Federation of  
State PIRGs**

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The Supreme Court's decision in this matter shows a deplorable lack of respect for precedent and represents a dark day for democracy in America. Once we've stopped the worst consequences of this decision, our attention must be turned to systemic reform, to creating a system for our elections which is wholly free of corporate money.

U.S.PIRG urges you and the committee members to support the package of legislative solutions that will soon be introduced, as well as to seek to make them as strong and punitive as possible to stop the flow of corporate money into our federal elections system.

Sincerely,  
Lisa Gilbert  
U.S.PIRG Democracy Advocate

Alaska PIRG • Arizona PIRG • California PIRG • Colorado PIRG • Connecticut PIRG • Florida PIRG • Georgia PIRG • Illinois PIRG • Indiana PIRG • Iowa PIRG • Maryland PIRG  
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[The statement of UAW and Communications Workers of America follows:]

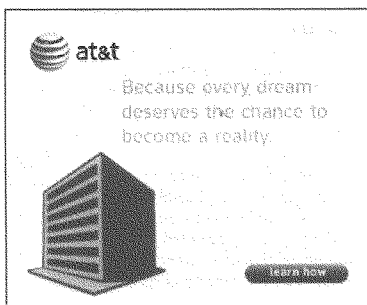
## THE HILL

### Why the Citizens United decision undermines democracy

By Ron Gettelfinger and Larry Cohen - 02/02/10 06:42 PM ET

In a stunning display of judicial activism that overturned federal and state campaign laws dating back to the early 19th century, the narrowest Supreme Court majority held that corporations have a constitutional right to use their treasury funds to make so-called "independent expenditures" supporting or opposing candidates for public office.

The Communications Workers of America and the United Auto Workers are deeply troubled by the court's recent 5-4 decision in *Citizens United v. FEC*. In our judgment, this misguided decision poses a fundamental threat to our democracy and our nation's ability to pursue policies that will benefit ordinary Americans, rather than just the wealthy, powerful elites.



The *Citizens United* decision will allow corporations to dominate the political process, just like they are able to dominate the workplace, undermining laws that are supposed to protect worker bargaining and organizing rights.

The Supreme Court's latest decision is based on two highly dubious propositions. First, the majority opinion simply asserts that corporations have the same First Amendment rights as individuals. This assertion has no basis in either the literal language of the Constitution or the statements of our Founding Fathers. As the dissent notes, "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires." And corporations don't have other important rights that the Constitution confers on individuals, including the right to vote or to be counted in the census that forms the basis for apportioning representation in Congress.

Second, the majority opinion argues that as long as corporate campaign expenditures are "independent," there is no danger of corruption or even the appearance of corruption of elected officials because there cannot be any "quid pro quo" arrangements. This is magical thinking. Given the intertwined connections between political operatives, the reality is that such expenditures are seldom truly "independent." Through their political consultants, corporations will be able to scope out what type of ads would be most helpful to the candidates they are supporting — or most damaging to the candidates they want to defeat.

Even if the expenditures were “independent,” however, public officials still would be influenced by the prospect that a corporation might spend millions on TV ads supporting or attacking their reelection. Public officials will hesitate to cross corporate lobbyists for fear they will become the target of a barrage of unflattering TV ads. For those officials who do toe the line, they will inevitably feel beholden to corporations who spend freely on positive ads to advocate their reelection.

One need look no further than the infamous “Swift Boat” ads for proof that so-called “independent” expenditures can have an even greater impact than direct contributions. Thus, the practical impact of the court’s decision is that corporations will be able to use the millions in their treasuries to exert massive pressure on elected officials to support policies beneficial to them.

These players with the deepest pockets will be able to pay premium prices for as many ads as they want, easily dominating the airwaves. In political advertising, like all advertising, repetition is what works. So the end result is that corporate spending will dominate the political process. And the voices and interests of ordinary Americans will be lost and their faith in representative democracy undermined.

Congress should act promptly to prevent this corporate coup d’etat. This should include holding hearings to document the corrosive impact that independent expenditure campaigns are likely to have on decision-making by public officials, as well as the questionable “independence” of such campaigns. Congress also should look to impose new requirements on corporate independent expenditure campaigns, such as shareholder approval and tougher disclosure and accountability measures. And it should still seek to prohibit government contractors and foreign corporations from engaging in such independent expenditure campaigns.

More sweeping reforms are needed to free candidates from their dependency on wealthy special interests by restoring our system of public financing in presidential elections and establishing public financing for congressional elections. Ultimately, the best solution would be to ensure that any future vacancies on the Supreme Court are filled with justices who will reject the misguided judicial activism in Citizens United, and instead restore the longstanding principles that protect the right of individual Americans to a free, honest and participatory government by preventing corporate wealth from dominating our political process.

*Gettelfinger is president of the International Union, UAW, and Cohen is president of the Communications Workers of America. The unions represent 2 million active and retired workers.*

Source:

<http://thehill.com/opinion/op-ed/79373-why-the-citizens-united-decision-undermines-democracy>

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[The statement of the Brookings Institution follows:]

## BROOKINGS

WEDNESDAY FEBRUARY 3, 2010

### Citizens United vs. Federal Election Commission is an Egregious Exercise of Judicial Activism

Campaign Finance, U.S. Supreme Court, U.S. Congress, Corporate Social Responsibility

Thomas E. Mann, Senior Fellow, Governance Studies

McClatchy Newspapers

JANUARY 26, 2010 — The 5-4 conservative majority decision in *Citizens United vs. the Federal Election Commission* that struck many decades of law and precedent will likely go down in history as one of the Supreme Court's most egregious exercises of judicial activism.

In spite of its imperative to rule on "cases and controversies" brought to the Court, to defer to the legitimate lawmaking authority of the Congress and other democratically elected legislatures, and to not allow simple disagreement with past judicial decisions to overrule precedent (*stare decisis*), the Roberts Court ruled unconstitutional the ban on corporate treasury funding of independent political campaigns.

The Court reached to make new constitutional law by ordering a re-argument of a minor case that itself raised no direct challenge to the laws and precedents that it ultimately overruled; dismissed the legitimacy of laws enacted over a century by Congress and state legislatures; equated the free speech protections of individuals and corporations in spite of countless laws and precedents that insisted on meaningful differences; and provided not a shred of evidence of new conditions or harmful effects that justified imposing their own ideological preferences on a body of settled law and social tradition.

The decision makes a mockery of Chief Justice Roberts' pious statements during his confirmation hearing that he embraced judicial modesty and constitutional avoidance. His concurring decision to respond to his critics was defensive and lame.

Justice Stevens' caustic dissent eviscerating the majority opinion penned by Justice Kennedy and the Roberts' concurrence will likely be featured in legal journals and classes for decades to come.

To be sure, *Citizens United* is not the first sign that the Roberts Court is dead set on deregulating campaign finance. Previous decisions have pointed in this direction and more are certain to follow.

How as a consequence are campaign finance practices likely to change? And what options exist for those who seek to limit or counter the anticipated fallout?

An immediate flood of corporate spending in federal and state campaigns is possible but uncertain.

CEOs of some major corporations are wary of entering the political thicket in so transparent a fashion for fear of alienating customers and shareholders. Legal means already existed prior to this decision (PACs, communications within the corporate family, issue ads, contributions to trade associations such as the Chamber of Commerce) to play a significant role in elections.

Privately controlled companies led by individuals with strong ideological and partisan motivations are most likely to take advantage of the new legal environment but they could already act without restraint as individuals. Perhaps the greatest impact will flow from the threat of corporate independent spending campaigns for or against officeholders whose position on issue's before federal and state governments is important to their corporate interests. This could corrupt the policy process without any dollars actually being spent. It will be some time before we are able to gauge the real impact of Citizens United.

In the meantime, Congress and legislatures in states with corporate prohibitions on their books will search for means of limiting or countering the ruling. Measures being considered are bans on political spending by corporations that have foreign ownership, government contracts or registered lobbyists or ones that have received federal bailout funds, strengthened disclosure, and requirements for shareholder approval of corporate political spending.

Most of these steps might be difficult to enact and even tougher to defend before post-Citizens United courts.

Over the longer haul, a more promising strategy is to fashion policy to encourage the proliferation of small donors to balance the political spending by corporations. In addition, politicians and citizen groups can speak and organize in a way that increases the costs to corporations who might otherwise avail themselves of this new opportunity. Large institutional and individual investors offended by the prospect of corporate treasuries being raided for political campaigns at the direction of top management might be persuaded to lead shareholder campaigns against such activities.

A radical conservative Supreme Court majority cavalierly decided to redress an alleged shortage of corporate political speech in American democracy. If, as I suspect, most Americans are bewildered and dismayed by that decision, their best recourse is to use their numbers and organizing energies to ensure that individual speech is not drowned by the trillions of dollars of corporate assets.

The CHAIRMAN. This hearing is now adjourned, and again I thank our panel.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

BRENNAN  
CENTER  
FOR JUSTICE

CORPORATE CAMPAIGN SPENDING:  
GIVING SHAREHOLDERS A VOICE

Clara Torres-Spellacy

Report prepared for the Foundation for American Education, Washington, D.C.



## ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism.

A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measureable change in the public sector.

## ABOUT THE BRENNAN CENTER'S CAMPAIGN FINANCE REFORM PROJECT

Campaign finance laws can be crafted to promote more open, honest, and accountable government and to bring the constitutional ideal of political equality closer to reality. The Brennan Center supports disclosure requirements that inform voters about potential influences on elected officials, contribution limits that mitigate the real and perceived influence of donors on those officials, and public funding that preserves the significance of voters' voices in the political process. The Brennan Center defends federal, state, and local campaign finance and public finance laws in court and gives legal guidance and support to state and local campaign finance reformers through informative publications and testimony in support of reform proposals.

## ACKNOWLEDGMENTS

The author would like to thank Karl J. Sandstrom, Bruce Freed and Professors Adam Winkler, Daniel Greenwood and Robert Mutch for reviewing a draft of the longer academic work which serves as the basis of this report, the Brennan Center's Director of the Democracy Program Susan Liss, Chief Counsel Frederick A.O. Schwarz, Jr., Counsel Monica Youn, Kelly Williams, and Mimi Marziani for their editorial suggestions, research assistants Vijay Das and Ali Hassan, undergraduate intern Sarah Nadler, legal interns Laura Kilian, Cheryl Isaac, Andrew Gehl, Roshni Chaudhari, Patricia Soung, and Cristina Gallo who helped research this piece. The Brennan Center thanks the Democracy Alliance Partners, the Carnegie Corporation of New York, the JEHT Foundation, the Joyce Foundation, the Open Society Institute, the Rockefeller Brothers Fund, and the Wallace Global Fund for the generous support that made this report possible. The statements made and the views expressed in this report are solely the responsibility of the Brennan Center.

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## FOREWORD

In *Citizens United*, decided January 21, 2010, the U.S. Supreme Court gave an unequivocal green light for corporate money in elections, by outlawing under the First Amendment, laws that limit corporate spending in elections. This radical decision overturned more than 100 years of settled law. While it is difficult to know how distorting an effect on our democratic electoral processes this decision will have, it is reasonable to expect a significant increase in corporate expenditures.

Corporate law is ill-prepared for this new age of corporate political spending by publicly-traded companies. Today, corporate managers need not disclose to their investors – individuals, mutual funds, or institutional investors such as government or union pension funds – how funds from the corporate treasury are being spent, either before or after the fact. And the law does not require corporate managers to seek shareholder authorization before making political expenditures with corporate funds.

This report proposes changes in corporate law to adapt to the post-*Citizens United* reality. Two specific reforms are suggested: first, require managers to **report corporate political spending directly to shareholders**, and second, require managers to **obtain authorization from shareholders before making political expenditures** with corporate treasury funds. Modeled on existing British law, these changes will ensure that shareholders' funds are used for political spending only if that is how the shareholders want their money spent.

This report represents the first of several proposed “fixes” to the damage done to American democracy by the Supreme Court’s *Citizens United* decision. The Brennan Center will also be releasing proposals to develop public funding systems that build on grassroots participation with matching funds. We will also be working to develop an alternative constitutional paradigm to the disastrous and radical view of the First Amendment adopted by a conservative majority of the Supreme Court. We will also continue working to repair voter registration systems through federal legislation that could bring millions more voters onto the registration rolls and reduce fraud and abuse. If our democratic system is permitted to be overrun with corporate spending, we can expect increased public cynicism about our institutions of government and further erosion in the public’s trust in our democratic system.

Susan M. Liss  
Director, Democracy Program  
Brennan Center for Justice

## EXECUTIVE SUMMARY

The Supreme Court has radically altered the legal landscape for politics with the 5-4 decision in the case *Citizens United v. FEC*, handed down on January 21, 2010. Turning back decades of statutory law, the Court has elevated the First Amendment rights of corporations to speak during elections, and has created a new paradigm for how political campaigns may be funded. The way that corporations “speak” is by spending money, usually to purchase advertisements that most individuals could not afford to finance.

Now that the Court has held that publicly-traded corporations have the same First Amendment protections as individuals, limitations on Congress’ ability to regulate their spending will be severely constrained. That means that corporate treasury money—including the funds invested by individuals, mutual funds, pension funds and other institutional investors—can be spent on politics without alerting investors either before or after the fact. Under current laws regulating corporations, there is nothing that requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent. Moreover, shareholders have no opportunity to consent to the political use of corporate funds.

This does not have to be the case. Britain has an alternative approach. In the U.K., companies disclose past political expenditures directly to shareholders. And more importantly, shareholders must authorize corporate political spending before a corporation uses shareholder funds on political spending.

This report argues for the United States to change its securities laws in the wake of *Citizens United* to

- (1) provide notice to shareholders of any and all corporate political spending and
- (2) to require shareholder authorization of future corporate political spending.

## INTRODUCTION

### THE PROPER ROLE OF CORPORATE MONEY IN OUR DEMOCRATIC PROCESS

In *Citizens United*, the U.S. Supreme Court majority determined that the First Amendment protects the use of corporate money in elections.<sup>1</sup> Roughly half of American households own stocks, many through mutual funds or 401(k) retirement accounts.<sup>2</sup> “Corporate money” in a publicly traded company is in part made up of investments from shareholders. Thus, corporate spending is in reality the spending of investors’ money.<sup>3</sup>

Political spending by corporations may raise the democratic problem of corruption or the appearance of corruption. For shareholders, the risk of corporate political spending attaches to the pocketbook.<sup>4</sup> Recent studies have shown that corporate political expenditures are symptomatic of problems with corporate governance and long-term performance. While these studies show correlation (and not causation) between political spending and poor firm performance,<sup>5</sup> it is worthy of worry that political spending may be indicative of risky corporate behavior.<sup>6</sup> Because of twin concerns about the protection of shareholders and the integrity of the political system, which may be corrupted by corporate dollars, a century’s worth of American election laws have prohibited corporate managers from spending a corporation’s general treasury funds in federal elections.<sup>7</sup> These prophylactic campaign finance laws<sup>8</sup> have protected shareholder interests by making corporate treasury funds off-limits to managers who might be tempted to spend this corporate money to support a personal favorite on the ballot.

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THE *CITIZENS UNITED* DECISION  
MEANS THAT CORPORATIONS CAN  
SPEND CORPORATE MONEY TO  
DIRECTLY SUPPORT OR OPPOSE  
CANDIDATES IN FEDERAL ELECTIONS  
AS WELL AS IN ALL 50 STATES.

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States’ corporate law and federal securities law—for the most part—do not address the issues that will arise with the advent of unfettered corporate political spending by managers. For years, state courts enforcing state corporate laws have largely turned a blind eye to managerial decisions to spend corporate money on politics.<sup>9</sup> Using what is known as the “business judgment rule,” state courts have allowed corporate managers to spend corporate treasury money on politics. Before *Citizens United*, in all states, corporations could use corporate treasury money on ballot measures, and in 28 states, corporations could use corporate treasury money on candidate elections. Now, the *Citizens United* decision means that corporations can spend corporate money to directly support or oppose candidates in federal elections as well as in all 50 states. Yet under state corporate

law, there are no clear standards about what corporate political spending would or would not be ultra vires or a waste of corporate assets. Furthermore, there are no federal or state laws or regulations requiring boards to report such spending to shareholders or requiring shareholders to approve political spending.

Should shareholders discover large or imprudent corporate political expenditures, they have very little recourse under current law. A suit for breach of fiduciary duty would likely be in vain. Shareholders would be faced with two unsatisfying solutions: either they could launch a costly campaign to vote out the board or they can sell their stock—possibly at a loss. Thus, under current U.S. law, shareholders cannot provide meaningful oversight of managerial whims to spend shareholder investments on politics.

This report will briefly lay out the issues presented by infusing corporate dollars into American politics, including the way disclosure of corporate political spending falls into a problematic regulatory gap between campaign finance law and corporate law, as well as how state corporate law and federal securities law fail to protect shareholders from managers' spending corporate dollars on elections.<sup>10</sup> Then this report will explore how the U.K. has approached the problem of corporate money in politics. Finally, this report will offer a concrete policy solution. Modeled on the British approach to corporate political spending, this report urges Congress to adopt a new law requiring publicly traded companies to provide two basic protections for shareholders: disclosure of past corporate political spending and consent to future corporate political spending.

## CHAPTER 1. THE LEGAL LANDSCAPE

### AFTER *CITIZENS UNITED*

*Citizens United v. FEC*, which was decided on January 21, 2010, has allowed corporate treasury money into federal elections and elections in 22 states. Technically, *Citizens United* involved little more than a narrow question of administrative law: whether a 90-minute film entitled “Hillary: the Movie,” which was highly critical of then-presidential candidate Hillary Clinton, and partially funded by for-profit corporate money, was covered by the elections law as a long-format, infomercial-style political ad.

But instead of focusing on this narrow question, the Supreme Court used *Citizens United* to give corporations the same political First Amendment Rights that an American citizen has. In doing so, the Court disturbed 63 years of law which barred corporate independent expenditures at the federal level and over a century of laws preventing corporate expenditures at the state level. *Citizens United* has dismantled campaign finance safeguards which used to address the problem of corporate managers using other people’s money in politics.

Before the *Citizens United* decision, pre-existing federal laws required corporate managers to make political expenditures via separate segregated funds (SSFs), also commonly known as corporate political action committees (PACs), so that shareholders, officers and managers who wanted the corporation to advance a political agenda could designate funds for that particular purpose. This scheme limited corporate influence on elections since the amount of funds that can be raised and contributed by PACs are subject to strict limits (federal PACs can accept individual donations of \$5,000 and can give a candidate \$2,400 per election).

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*CITIZENS UNITED* HAS DISMANTLED CAMPAIGN  
FINANCE SAFEGUARDS WHICH USED TO ADDRESS  
THE PROBLEM OF CORPORATE MANAGERS USING  
OTHER PEOPLE’S MONEY IN POLITICS.

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These laws protected both the integrity of the democratic process as well as shareholders. Recognizing the wisdom of this approach, as of 2010, 22 states had followed suit with similar laws. In the 28 states that lacked federal-style election rules, corporations were able to give political donations to candidates directly from their corporate treasuries and they could make independent expenditures on behalf of such candidates using corporate funds.<sup>11</sup> This money could be used in such states to pay for expenditures in legislative, executive and judicial elections, all without consent from or notice to shareholders. Now, post-*Citizens United*, corporate money may be used by corporate managers to directly support or oppose candidates in all state and federal elections.



## CHAPTER 2. THE PROBLEMS WITH CORPORATE POLITICAL SPENDING

### A. THE DEMOCRATIC PROBLEM

The democratic problem posed by unfettered corporate political spending is the risk that policymakers will base their legislative decisions on what's best for corporations instead of what's best for citizens and voters. There is ample reason to be concerned that there will be a new influx of corporate cash into elections, given the recent history of corporate political spending, and to worry about the impact on our democracy resulting from that new influx.

Despite the federal ban on the use of corporate treasury money to support or oppose candidates, corporate money has made its way into the electoral process through several different avenues—and has influenced elections for years. By any measure, corporate money is frequently used to try to influence ballot measures and to elect, re-elect and unseat candidates at the state, federal and even international level.<sup>12</sup>

In the 2008 U.S. federal election, which was marked by a lengthy presidential primary season, the grand total raised by all federal candidates was \$3.2 billion. Money from corporate PACs comprised one out of every ten federal dollars contributed<sup>13</sup> and corporate PACs' contributions to Congressional races were one of every three PAC contributions between 1997 and 2008.<sup>14</sup> Although this report is not focused on corporate PACs, but rather on money that comes directly from corporate treasuries, it is nonetheless interesting to note since 2005, 173 corporate donors, "their Political Action Committees, executives and other employees have contributed, under campaign finance law limits, \$180 million to federal candidates and political parties, an average of over \$1 million per organization."<sup>15</sup>

Exactly how more corporate money in politics may affect American policy is hard to predict. Following on the heels of *Citizens United*, one risk is that politicians may change their behaviors based on real or perceived new threats of high corporate political spending.<sup>16</sup> An open question is: will elected officials refrain from supporting reforms that are hostile to big corporate donors and instead favor policies dictated by corporate donors?<sup>17</sup> And while it is difficult to document actual influence over policy, it is possible the influx of corporate money may result in a public perception that the government is for sale to the highest bidder, further damaging the public trust in our democratic system. It is this perception of corruption that is corrosive to democratic norms.<sup>18</sup>

## THE DIFFERENCE BETWEEN A CORPORATE PAC AND THE CORPORATE TREASURY

A **corporate PAC, or SSF**, is a political action committee organized by a corporation to gather money that will be used in elections. The corporate PAC can solicit money from shareholders, executives, directors and certain high level employees and their families.<sup>19</sup> Everyone who gives to the corporate PAC does so voluntarily and is on notice that the money will be used on politics. Individuals may give \$5,000 to a SSF every year and may give a maximum of \$69,900 to all SSF, PACs and parties every two years.<sup>20</sup>

By contrast, **corporate treasury** money includes all the money from the corporation's business operations, and corporate treasury money in publicly-traded companies includes all of the money invested by shareholders.

### B. OTHER PEOPLE'S MONEY

When managers of publicly-traded companies spend corporate treasury money on politics, they do so using other people's money—in part, money invested by shareholders.<sup>21</sup> Some studies have indicated that corporate contributions appear to be linked with wind-falls for donating corporations.<sup>22</sup> But the narrative of political spending as an unmitigated good is not the only one available. For example, a recent study of 12,000 firms by Professors Aggarwal, Meschke, and Wang<sup>23</sup> revealed that despite corporate managers' attempts to influence public policy through spending on elections, corporate political spending correlates with lower shareholder value.<sup>24</sup>

Aggarwal and his co-authors suggest that high levels of political spending are a trademark of poor corporate management, and that "managers willing to squander small sums on political giving are likely to squander larger sums elsewhere."<sup>25</sup> Consequently, one potential risk posed by deregulation of corporate money in politics is that corporate managers who were restrained by the PAC requirement will spend much more money on politics—using the corporate treasury to support their personal political agendas.<sup>26</sup> Now that the Supreme Court has given its imprimatur to corporate political spending, new protections need to be implemented to protect shareholders from managers' potentially profligate spending on politics.

The Center for Political Accountability (CPA) has also done case studies of corporate political contributions linked to firm failure. The CPA found:

Enron, Global Crossing, WorldCom, Qwest and Westar Energy each made corporate contributions a key part of their business strategies, enabling them to avoid oversight, engage in alleged illegal activities and gain uncharacteristic advantage in the marketplace—the combination of which led to their ignominious downfall at the expense of their shareholders.<sup>27</sup>

Enron, Global Crossing and WorldCom ended up in bankruptcy—at the time, these were among the biggest bankruptcies in U.S. history;<sup>28</sup> Qwest and Westar Energy came perilously close to bankruptcy.<sup>29</sup>

Furthermore, shareholders' own First Amendment interests could be trampled if their investments are used to support candidates and causes that they do not wish to endorse. As the European Corporate Governance Service explains:

This is exactly why partisan political donations are such a bad idea for companies. Shareholders' views of which, if any, political party's program[] will benefit them most will vary dramatically. And many may conclude that any political expenditure is a waste of their money. The danger is... that shareholders' views are actually overlooked and management decides for itself to position the company as politically partisan. And this in turn may lead to reputational damage.... The safest option for both companies and shareholders is simply to avoid these types of corporate donations altogether.<sup>30</sup>

### **1. Poor Disclosure of Corporate Political Spending**

According to Justice Kennedy, writing the lead opinion in *Citizens United*, the free flow of information empowers shareholders to protect their own interests. As Kennedy wrote, "Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative."<sup>31</sup> Unfortunately, this assumption that there is readily available information about corporate political spending appears to be based on a misunderstanding of the state of the law.

As U.S. law stands now, corporate managers can spend corporate money on politics without notifying shareholders either before or after the fact and they can make this political spending without any authorization from shareholders.<sup>32</sup> This is problematic because the political interests of managers and shareholders can and do diverge.<sup>33</sup> Unfortunately, currently, neither corporate law nor campaign finance law provides shareholders with accessible salient information about the total universe of corporate political spending.

### a. Campaign Finance Law Reporting

Campaign finance disclosure laws vary from the federal to state level as well as from state to state. Corporate political spending can be underreported because the duty to report often falls on the candidate or party receiving the money and not the corporation giving the money. Furthermore, as will be discussed below, many states and the FEC simply have weak reporting requirements that do not capture the ways modern corporations spend money on politics.

The Federal Election Commission (FEC) requires reporting from candidates, political committees and parties. Corporate SSFs report their spending directly to the FEC.<sup>34</sup> To track contributions by SSFs at the federal level, the public must know the exact names of the SSFs involved. Tracking spending becomes difficult when an SSF does not contain the “doing-business-as” name of the corporation at issue. A common tactic is for the corporate SSFs to give to benign sounding PACs which, in turn, give directly to federal candidates. For example, the Abraham Lincoln Leadership Political Action Committee, the Democracy Believers PAC, and the Freedom and Democracy Fund are largely funded by corporate SSFs.<sup>35</sup>

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AS U.S. LAW STANDS NOW, CORPORATE MANAGERS CAN SPEND CORPORATE MONEY ON POLITICS WITHOUT NOTIFYING SHAREHOLDERS EITHER BEFORE OR AFTER THE FACT AND THEY CAN MAKE THIS POLITICAL SPENDING WITHOUT ANY AUTHORIZATION FROM SHAREHOLDERS.

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Federal spending is only one subset of political spending. Post-*Citizens United*, corporations may directly support or oppose candidates in every state election. And even before *Citizens United*, corporations could spend money on ballot initiatives in all 50 states. Spending in state elections is reported in that state, and not to a central location like the FEC. Each state has its own distinct disclosure requirements with its own definitional loopholes.

Reporting political expenditures under state campaign finance laws is particularly spotty, creating many opportunities for corporations to conceal their role underwriting politics. While most corporate political spending is technically reportable to state regulators (again, often by the candidate and not by the corporation), state laws are porous and may not capture the full universe of political spending. As the Campaign Disclosure Project has demonstrated, year after year, states fail to achieve meaningful disclosure or accessible databases.<sup>36</sup> To reconstruct the total amount of reported political spending, shareholders would have to comb through vast volumes of records at the federal and state level<sup>37</sup>—and perhaps even at the international level—to learn how much and to whom corporations contribute.<sup>38</sup>

Some political spending falls under the radar, so no matter how much due diligence a shareholder does, the spending remains unknown. For example, trade associations, such as the U.S. Chamber of Commerce, do not divulge the identity of those funding their political activities and most corporations do not divulge how much they have given to trade associations.<sup>39</sup> Increasingly, corporations are making anonymous contributions to trade associations and other tax-exempt organizations which are becoming “proxies for corporate political involvement.”<sup>40</sup>

#### **b. Corporate Law Reporting**

Federal securities law also fails to require that shareholders receive information regarding corporate political spending. The Securities and Exchange Commission (SEC) has no rule or regulation requiring disclosure by publicly-traded companies of their political spending to shareholders or the investing public. Even for the political spending that is properly reported to a government agency, there is no legal duty to share this information directly with shareholders in an accessible way, such as in a Form 10-K annual report. Because political spending by corporate entities is not disclosed in a single place, discovering the full extent of the political spending of any corporate entity takes copious research, to the extent that such spending is discoverable at all.

The problem of lack of full transparency of political spending is not a novel one. In the aftermath of Watergate, Congressional hearings and SEC investigations revealed that 300 American corporations had made questionable or illegal payments both domestically and to foreign governments—including campaign contributions. The result of these revelations resulted in the SEC’s requiring voluntary disclosure by corporations of questionable foreign political payments and in Congress’ passing the Foreign Corrupt Practices Act.<sup>41</sup> In a speech supporting the passage of the legislation, then-SEC Commissioner John R. Evans argued for the need for transparency and the risk posed to the soundness of the financial markets:

Disclosures of illegal or questionable payments in connection with business transactions raises serious questions as to the degree of competition with respect to price and quality because significant amounts of business appear to be awarded not to the most efficient competitor, but to the one willing to provide the greatest personal economic rewards to decisionmakers. Such disclosures... also raise questions regarding the quality and integrity of professional corporate managers and whether they are fulfilling their obligations to their boards of directors, shareholders, and the general public.<sup>42</sup>

While the Watergate-era revelations included out-and-out bribes, many of the same concerns raised by Commissioner Evans echo today as shareholders often know very

little about the beneficiaries of corporate political expenditures made by corporate managers and any ensuing risks.<sup>43</sup> Furthermore, shareholders may unwittingly fund political spending at odds with their own political philosophies.<sup>44</sup> As Professor Jill Fisch has explained:

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THIS BASIC ASYMMETRY OF INFORMATION BETWEEN A CORPORATION AND ITS BENEFICIAL OWNERS NEEDS TO BE ADDRESSED BY CHANGING FEDERAL SECURITIES LAWS TO BETTER INFORM SHAREHOLDERS.

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Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls. The lack of oversight makes it difficult for corporate decision makers and stakeholders to evaluate the costs and benefits of political activity.<sup>45</sup>

With boards in the dark about corporate political spending, shareholders have little hope of fully understanding the scope of companies' political expenditures.<sup>46</sup> This basic asymmetry of information between a corporation and its beneficial owners needs to be addressed by changing federal securities laws to better inform shareholders. As a leading corporate law firm advocated in a public memorandum:

Shareholders have legitimate interests in information about corporate policies and practices with respect to social and environmental issues such as climate change, sustainability, labor relations and political contributions. These issues, many of which do not fall neatly within a line item disclosure requirement, bear on the company's reputation as a good corporate citizen and consequently, the perceived integrity of management and the board.<sup>47</sup>

## 2. The Lack of Shareholder Consent

In the *Citizens United* decision, Justice Kennedy, writing for the 5-4 majority, brushed aside the need for shareholders' protection because there was "little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy."<sup>48</sup> However, as will be discussed below, there are serious limitations to what shareholders can do in response to corporate political spending, especially for undisclosed spending.

One troublesome problem is that even if political expenditures are disclosed, the law does not require any meaningful shareholder consent to corporate political spending. In contrast to money that is given to a corporate PAC expressly for use in politics, shareholders do not generally invest in a corporation with the intent to make political state-

ments.<sup>49</sup> In fact, investor's money is being spent on politics without any requirement for explicit permission or authorization from shareholders.

State-based corporate law today does not adequately address the issue of managers' use of corporate money in politics. The 103 years of regulating corporate political money through the federal election laws has left a system of norms which are ill-suited for the new era ushered in by the *Citizens United* decision, when corporate treasury money will be widely available for large-scale political expenditures.

In fact, state courts have allowed corporate political spending under the business judgment rule. Instead of finding that such spending is ultra vires or a waste of corporate assets, so far, courts have used the permissive "business judgment rule" to allow corporate managers to spend corporate money on politics without meaningful restrictions.<sup>50</sup> Thus, shareholder suits alleging a violation of the board's fiduciary duty because of corporate political spending are likely in vain. Professor Thomas Joo elucidates:

Shareholders must allege corruption or conduct approaching recklessness in order to even state a claim challenging management actions. This principle of deference is not limited to decisions regarding 'business,' narrowly defined. Courts have applied business judgment deference to...political spending on the ground that management may believe such decisions will indirectly advance the corporation's business.<sup>51</sup>

Now that the Supreme Court has stripped away the campaign finance protections requiring that corporations directly support or oppose candidates only through PACs, fundamental changes that would result in more internal corporate controls of political spending are needed.<sup>52</sup> One of those new internal controls should require managers to

seek authorization from shareholders before making political expenditures with corporate treasury money under the U.S. securities laws.

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A BETTER SYSTEM IS ONE IN WHICH THE SHAREHOLDERS KNOW ABOUT THE SPENDING AND AUTHORIZE IT BEFORE IT LEAVES THE CORPORATION'S COFFERS.

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Some have argued that market discipline alone will prevent a corporation from spending an excessive amount

on politics. For instance, at the *Citizens United* oral argument, Chief Justice John Roberts asked the Solicitor General Elena Kagan, "can't [shareholders] sell their shares" if they object to particular political spending by a given corporation?<sup>53</sup> But the theoretical ability to exit an investment is not a real solution to this problem. First, the ability to sell is highly constrained for many investors if they own their shares through an intermediary

like a pension fund or a 401k that is invested in mutual fund. In that case, the choice to divest from the individual shares lies with the fund manager. The only way a beneficial owner who holds stock through a fund can be sure they are not invested in an offending stock is by divesting from the fund entirely. Such actions may trigger adverse tax consequences and penalties.

Moreover, even for those who do own stocks directly, selling shares after a corporation has made an ill-advised or large political expenditure provides little remedy to the shareholder. The corporate money has already been spent, never to return to the corporate treasury, potentially deflating shareholder value. A better system is one in which the shareholders know about the spending and authorize it before it leaves the corporation's coffers.



### CHAPTER 3. THE BRITISH MODEL

The current American model where corporate money flows into the political system through obscured channels need not be the norm. There is another way—the British system. The British provide a useful and elegant legislative model that the United States should emulate now that the Supreme Court's *Citizens United* decision has overturned the federal law banning the use of corporate treasury funds for electioneering. The U.K. allows direct corporate donations<sup>54</sup> to candidates and political parties, yet it does so with much more transparency.<sup>55</sup> In 2000, the U.K. adopted an amendment to its Companies Act, which requires British companies to disclose political contributions to its shareholders as well as to seek consent from shareholders before political donations are made.<sup>56</sup>

Like the U.S., the U.K. has had its share of campaign finance scandals. As a researcher at the House of Commons explained the history of political funding before the 2000 U.K. reforms:

The main objections to the [pre-2000] system, where party finances are largely free from any statutory regulation, revolve around suspicions that financial considerations can buy undue influence and improper access. ... There is now a great deal of support for more openness and transparency in the system. Among the issues perceived as causing most concern are: large donations from individuals and companies, and, more specifically, the correlation between donations and access to Ministers, influence on policy, favourable commercial considerations, and the receipt of honours or other personal appointments...<sup>57</sup>

These atmospherics contributed to the sense that reform was needed in the U.K. However, the 2000 changes in British law came about as a direct response to the Fifth Report of the Committee on Standards in Public Life.<sup>58</sup> Lord Neill, who chaired the Committee, explained the need for the new approach:

Many members of the public believe that the policies of the major political parties have been influenced by large donors, while ignorance about the sources of funding has fostered suspicion. We are, therefore, convinced that a fundamentally new framework is needed to provide public confidence for the future, to meet the needs of modern politics and to bring the United Kingdom into line with best practice in other mature democracies.<sup>59</sup>

Consequently, the Committee recommended that a company wishing to make a donation to a political party should have the prior authority of its shareholders.<sup>60</sup> This reform was adopted by Parliament.

British law requires if a company has made a political donation of over £2,000, then the directors' annual report to the shareholders must include the name of who received the donation and the donation amount.<sup>61</sup> In England, the directors' report is equivalent to a company's 10-K annual report in the United States and £2,000 is roughly equal to \$3,000 at current exchange rates.<sup>62</sup>

In addition to requiring disclosure, the British law goes further and requires shareholder consent for spending over £5,000 on political expenditures.<sup>63</sup> At current exchange rates, £5,000 is roughly \$8,000. If shareholders in British companies do not approve a political donation resolution, then the company cannot make political contributions during the relevant period.<sup>64</sup> Also, directors of British companies who make unauthorized political donations are personally liable to the company for the amount spent plus interest, and must compensate the company for any loss or damage as a result of the unauthorized donation or expenditure.<sup>65</sup> The interest rate charged on unauthorized political expenditures is 8% per annum.<sup>66</sup>

## HOW THE BRITISH SYSTEM WORKS

British shareholders do not approve each and every individual political donation. Instead the managers ask for a political budget for a year or longer for a certain amount of money (say £100,000). Shareholders then give an up or down vote. If management loses the vote, then managers cannot spend the money without subjecting themselves to liability.

In fact, British companies with American businesses actually report their American political expenditures to their British shareholders under the Companies Act.<sup>67</sup> British firms are among some of the biggest corporate donors in U.S. elections.<sup>68</sup> For a sample of such firms, please see *Appendix A*. Thus, harmonizing American law with British law would not require any additional data gathering for companies which are already reporting American giving in the U.K.

### A. THE APPARENT DROP IN CORPORATE POLITICAL EXPENDITURES

The effect of these legal changes in the Companies Act on the political behavior of British companies should be a matter of future study by political scientists. One British newspaper reported in 2008, “U.K. political donations, once commonplace for listed blue-chip companies, have almost disappeared ....”<sup>69</sup> The publicly-available data on pre- and post-2000 corporate political spending in the U.K. is incomplete. The available data show that, both before and after the reform, most corporate money went to the Conservative Party.<sup>70</sup> The Labour Party has historically received substantially less corporate monies.<sup>71</sup> For example, during the 1995-1996 fiscal year, there were only three corporate donations to the Labour Party totaling £98,000.<sup>72</sup> In contrast, that year, the Conservative Party received approximately £2.7 million from 145 companies.<sup>73</sup> Similarly, for the 1997-1998 fiscal year, there were 120 corporate donations worth a total of £2.88 million to the Conservative Party.<sup>74</sup> After the reforms, the total company donations to the Conservatives fell to £1.74 million in 2001 and £1.16 million in 2003.<sup>75</sup>

To be sure, not every British company has foregone large political expenditures.<sup>76</sup> Overall, however, spending by individual companies appears to have dropped after the 2000 reforms. A study of corporate donations from 1987-1988 showed 28 companies that had given £50,000 or more.<sup>77</sup> In contrast, a recent sampling of the biggest U.K. firms reveals that many of the same firms which used to give at the £50,000 level have decided to forego political spending altogether. Others are spending more modest amounts.<sup>78</sup> However, it should be clear that the choice of British companies to spend corporate monies in U.K. elections is firmly in the hands of the managers, once they have received shareholders’ approval. As will be discussed below, nearly every resolution seeking shareholder approval of corporate political spending is approved. Whether the company goes on to use authorized corporate funds on politics is management’s decision. Many British companies are choosing not to spend on politics even after gaining clear authorization from shareholders.

### B. U.K. PROXY VOTES TO AUTHORIZE BRITISH POLITICAL SPENDING

The Brennan Center partnered with the Pensions and Investment Research Consultants Limited (PIRC), an independent British research and advisory firm that provides data on corporate governance to institutional investors, to gather a data set of proxy votes authorizing political spending by firms subject to the Companies Act. The data from PIRC includes resolutions dating back to January 1, 2002 for over 150 companies subject to the Companies Act—a total of 638 shareholder resolutions authorizing political corporate spending in eight years.

The PIRC data reveals that most British companies seeking authorization from their shareholders under the Companies Act seek modest political budgets ranging from £12,000 to £250,000 for a year or longer.<sup>79</sup> There were a few exceptions. For example, BP (formerly known as British Petroleum) sought and was granted an authorization for £400,000 for itself and an additional £400,000 for BP International Limited over a four year period.<sup>80</sup> British American Tobacco sought and was granted an authorization for £1 million over a four year period,<sup>81</sup> but these were outliers.

### C. DISCLOSURE OF U.K. CORPORATE POLITICAL SPENDING

In terms of recent political spending, companies gave detailed accounts of how the money had been spent.<sup>82</sup> For example, ITV PLC made detailed accounts, reporting “[d]uring the year the Group made the following payments totalling £7,968 (2007: £9,110): Labour Party £3,920; Conservative Party £685; Liberal Democrat Party £2,086 and Plaid Cymru Party £1,277.”<sup>83</sup>

Most companies asked for a general authority from their shareholders to make political expenditures in the U.K. and Europe. However one company has indicated for several years in a row which political party it intended to benefit. Caledonia Investments PLC sought and was granted authorization to give £75,000 to the Conservative Party for two years.<sup>84</sup>

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A REVIEW OF THE RECENT ANNUAL  
REPORTS BY TOP BRITISH FIRMS  
REVEALS THAT MANY COMPANIES ARE  
REFRAINING FROM POLITICAL  
SPENDING AND HAVE A STATED POLICY  
AGAINST THE PRACTICE.

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A review of the recent annual reports by top British firms reveals that many companies are refraining from political spending and have a stated policy against the practice. For example, British Airways states in its most recent annual report that:

We do not make political donations or incur political expenditure within the ordinary meaning of those words and have no intention of doing so. The amount of political donations made and political expenditure incurred in the year to March 31, 2009, was £nil (2008: £nil).<sup>85</sup>

Many firms shared this policy of not making political contributions. For example, HMV, the music retailer, stated in its most recent annual report: “[i]t is Group policy not to make donations to political parties or independent election candidates and therefore no political donations were made during the period.”<sup>86</sup> Burberry also shared this approach noting, “[t]he Company made no political donations during the year in line with its policy.”<sup>87</sup>

Some of the same firms which have policies against political donations nonetheless have sought shareholder authorizations to avoid inadvertent violations of British law. As GlaxoSmithKline explains:

GSK has adopted a global policy ending the provision of political contributions in any market in which the company operates....However, in order to protect GSK from any inadvertent violation of the U.K. law (where political contributions are defined very broadly) GSK will continue to seek shareholder approval for political contributions within the EU.<sup>88</sup>

Cadbury shared this precautionary approach:

The Company has a long standing policy of not making contributions to any political party....neither the Company, nor any of its subsidiaries, made any donation to any registered party....However, the [U.K. Companies Act] contains very wide definitions of what constitutes a political donation and political expenditure. Accordingly, as a precautionary measure to protect the Company ..., approval will be sought at the 2009 AGM for the Company to make donations to political organisations ...of £100,000.<sup>89</sup>

#### D. RESISTANCE TO U.K. CORPORATE POLITICAL SPENDING

While some British pension funds are categorically opposed to corporate political spending and state so in their explanations of their voting philosophies,<sup>90</sup> shareholders generally approve the corporate political budgets requested by British firms.<sup>91</sup>

However, in at least one instance, shareholders have defeated a corporate political budget.<sup>92</sup> In 2004, for example, shareholders voted against a resolution to authorize £1.25 million in political spending by BAA PLC. This resolution was proposed by a shareholder who was angry at the revelation that BAA had given free airport parking passes to members of Parliament. The shareholder considered these free passes to be political donations, and thus he sought shareholder approval of the value of the passes.<sup>93</sup> The shareholders voted against this authorization.<sup>94</sup> It is not clear from this vote whether shareholders agreed with the motives of the shareholder proposing it or not. Nonetheless, after the shareholder vote, BAA stopped giving free passes to Parliamentarians.<sup>95</sup>

The BAA example shows the benefits of transparency in empowering shareholders. When a corporation spends a large sum on politics, shareholders can react to the disclosure by deciding to limit such spending in the future. British shareholders, like those invested at BAA, have this power, and so should investors in American companies.

## POLICY PROPOSAL

## CHAPTER 4.

## SUGGESTED CHANGES TO U.S. SECURITIES LAW

The U.S. should adopt the British approach to political expenditures by

- (1) requiring disclosure of political spending directly to shareholders,
- (2) mandating that corporations obtain the consent of shareholders before making political expenditures, and
- (3) holding corporate directors personally liable for violations of these policies.

This approach will empower shareholders to affect how their money is spent. It also may preserve more corporate assets by limiting the spending of corporate money on political expenditures. A section-by-section summary outlining one proposed legislative fix is attached as *Appendix B*.

As explained in Chapter 2, currently, the disclosure of corporate political spending is inconsistent, keeping shareholders in the dark about whether their investment money is being used in politics. At the very least, Congress should require corporations to disclose their political spending, as many top firms have already volunteered to do. At the urging of the Center for Political Accountability, 70 companies, 48 of which are in the S&P 100, have agreed to disclose all of their political spending to shareholders.<sup>96</sup>

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AT THE URGING OF THE CENTER FOR  
POLITICAL ACCOUNTABILITY, 70 COMPANIES,  
48 OF WHICH ARE IN THE S&P 100, HAVE  
AGREED TO DISCLOSE ALL THEIR  
POLITICAL SPENDING TO SHAREHOLDERS.

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To be useful, disclosure of political spending under this proposal should be frequent enough to notify shareholders and the investing public of corporate spending habits, and yet with enough of a time lag between reports so that corporations are not unduly burdened. To accommodate these two competing goals, disclosure of political expenditures should occur quarterly to coincide with company's filing of its Form 10-Qs with SEC. Because the political disclosure will be contemporaneous with the 10-Q filing, transaction costs can be minimized.

The Brennan Center is not alone in calling for more transparency in corporate political activity. The Center for Political Accountability,<sup>97</sup> Interfaith Center on Corporate Responsibility,<sup>98</sup> Common Cause,<sup>99</sup> and the Nathan Cummings Foundation,<sup>100</sup> to name just a few, have all pushed for better disclosure of political spending by corporations.

But disclosure alone is not enough. Congress should act to protect shareholders by giving them the power, under statute, to authorize political spending by corporations. The voting mechanics would work in the following way: At the annual meeting of shareholders (a.k.a., the “AGM”), a corporation that wishes to make political expenditures in the coming year should propose a resolution on political spending which articulates how much the company wishes to spend on politics.<sup>101</sup> If the resolution gains the vote of the majority of the outstanding shares (50% plus 1 share), then the resolution will be effective, and the company will be able to spend corporate treasury funds on political matters in the amount specified in the resolution. However, if the vote fails to garner the necessary majority, then

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THESE PROPOSED CHANGES TO U.S. SECURITIES LAW WILL PROVIDE ENHANCED SHAREHOLDER RIGHTS THROUGH GREATER TRANSPARENCY OF CORPORATE POLITICAL SPENDING AND WILL ENSURE THAT WHEN CORPORATIONS SPEND OTHER PEOPLE’S MONEY ON POLITICS, THAT THEY DO SO WITH FULL INFORMED CONSENT.

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the corporation must refrain from political spending until the shareholders affirmatively vote in favor of a political budget for the company.

Finally, to ensure that this reform has teeth, another aspect of British law should be duplicated: personal director liability. Directors of U.S. companies who make unauthorized political expenditures using company funds should be personally liable to the company for the unauthorized amount.

Our support for the British model is grounded in concerns about administration and transaction costs. A system which puts every political action of a corporation to a vote would be costly and unwieldy to administer. By contrast, under this proposal, the corporation can simply add an additional question (on authorization of the political budget) to the list of items which are regularly subject to a shareholder vote at the annual meeting, alongside such traditional matters as the election of the board of directors or appointing auditors.

In summary, to improve American corporate governance, the U.S. should change its securities laws to mirror current British law in this area, and should require publicly-traded companies to:

- (1) report their political spending directly to their shareholders on a periodic basis, and
  - (2) get shareholders’ authorization before spending corporate treasury funds on politics.
- In addition,
- (3) any unauthorized political spending should result in personal liability for directors.

These changes should be made at a federal level to put all publicly-traded companies on an equal playing field.

Justice Kennedy's opinion in *Citizens United* is correct that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>102</sup> But he was mistaken in thinking that the necessary transparency for shareholders and the investing public is already in place.

These proposed changes to U.S. securities law will provide enhanced shareholder rights through greater transparency of corporate political spending, and will ensure that when corporations spend other people's money on politics, that they do so with full informed consent. The net effect of similar laws in Britain appears to have curbed corporate political spending. These reforms could moderate the role of corporate money in American politics in a post-*Citizens United* world.



## APPENDIX A

SAMPLE OF BRITISH/AMERICAN COMPANIES REPORTING  
AMERICAN POLITICAL SPENDING<sup>103</sup>

<i>Company</i>	<i>Website</i>	<i>US Giving Disclosed</i>
Astra-Zeneca	<a href="http://www.astrazeneca-annual-reports.com/2007/business_review/governance/other_matters.asp">http://www.astrazeneca-annual-reports.com/2007/business_review/governance/other_matters.asp</a> <a href="http://www.astrazeneca-annual-reports.com/2008/downloads/AZ_AR08_Full.pdf">http://www.astrazeneca-annual-reports.com/2008/downloads/AZ_AR08_Full.pdf</a> (page 95)	2006: \$416,675 2007: \$321,645 2008: \$815,838 by US entities "to state political party committees, campaign committees of various state candidates affiliated with the major parties in accordance with pre-established guidelines"
GlaxoSmithKline PLC	<a href="http://www.secinfo.com/d139r2.s3h.htm#n4au">http://www.secinfo.com/d139r2.s3h.htm#n4au</a>	2008: £319,000; 2007: £249,000; Glaxo discontinued political contributions as of July 2009 but the GSK PAC continues to give: in 2008 it gave £539,359 and in 2007 it gave £522,172.
Lockheed Martin	<a href="http://www.lockheedmartin.com/investor/corporate_governance/PoliticalDisclosures.html">http://www.lockheedmartin.com/investor/corporate_governance/PoliticalDisclosures.html</a>	Has PAC, gives soft money to Democratic Governors Association & Republican Governors Association. Total expenditures in 2008: \$82,375.
ExxonMobil Corporation	<a href="http://www.exxonmobil.com/Corporate/Imports/ccr2008/pdf/community_ccr_2008.pdf">http://www.exxonmobil.com/Corporate/Imports/ccr2008/pdf/community_ccr_2008.pdf</a>	Corporate political contributions—U.S. state campaigns and national 527s: 2005: \$340,000 2006: \$410,000 2007: \$270,000 2008: \$450,000
National Grid	<a href="http://www.nationalgrid.com/annualreports/2007/06_dir_reports/dir_report.html">http://www.nationalgrid.com/annualreports/2007/06_dir_reports/dir_report.html</a> ; <a href="http://www.nationalgrid.com/annualreports/2008/">http://www.nationalgrid.com/annualreports/2008/</a> <a href="http://www.nationalgrid.com/annualreports/2009/directors_reports/index.html">http://www.nationalgrid.com/annualreports/2009/directors_reports/index.html</a>	2006-07: \$100,000 fr. National Grid; \$146,706 fr. National Grid PAC 2007-08: \$70,000 fr. National Grid; \$56,656 fr. PAC; Keyspan gave \$37,015 2008-09: \$180,000 fr. National Grid and subs to NYS PACs; \$156,975 fr. National Grid PACs

## **APPENDIX B**

### **A SUMMARY OF THE SHAREHOLDER'S RIGHTS ACT**

#### **SECTION 1. SHORT TITLE.**

This Act may be cited as the "Shareholder's Rights Act of 2010".

#### **SECTION 2. FINDINGS AND DECLARATIONS.**

Describes the need for shareholder authorization of corporate general treasury funds for political expenditures.

#### **SECTION 3. DEFINITIONS.**

#### **SECTION 4. SHAREHOLDER VOTE ON CORPORATE POLITICAL ACTIVITIES.**

Amends Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) by adding at the end the following new subsection:

- (1) **ANNUAL VOTE** – Requires that at an annual meeting of the shareholders there must be a vote to authorize use of corporate general treasury funds for political expenditures.
- (2) **SHAREHOLDER APPROVAL** – Regulates the mechanism of seeking shareholders authorization for expenditures for political activities.
- (3) **DISCLOSURE OF SHAREHOLDER VOTES** – Requires institutional investment managers subject to section 13(f) of the Exchange Act to report at least annually how they vote on any shareholder vote.
- (4) **DIRECTOR LIABILITY** – Mandates that if a public corporation makes an unauthorized contribution or expenditure for a political activity, then the directors are liable to repay to the corporation the amount of the unauthorized expenditure, with interest at the rate of eight percent per annum.
- (5) **RULEMAKING** – Directs the Securities and Exchange Commission to issue final rules to implement this subsection not more than 6 months after the date of the enactment of this Act.

**SECTION 5. NOTIFICATION TO SHAREHOLDERS OF CORPORATE POLITICAL ACTIVITIES.**

Amends the Securities Exchange Act of 1934 to create standards for notification and disclosure to shareholders of corporate political activities. Requires and sets standards for quarterly reporting by public corporations on contributions or expenditures for political activities. Requires that these quarterly reports be made part of the public record; and a copy of the reports be posted for at least one year on the corporation's website.

**SECTION 6. PUBLIC DISCLOSURE OF CORPORATE POLITICAL ACTIVITIES BY THE SECURITIES AND EXCHANGE COMMISSION.**

Amends Section 24 of the Securities Exchange Act of 1934 to regulate public disclosure of political activities by a public corporation to shareholders. Requires that a quarterly report be filed under this subsection be filed in electronic form, in addition other filing forms. Directs the Securities Exchange Commission to make the quarterly reports on political activities publicly available through the Securities and Exchange Commission's website in a manner that is searchable, sortable and downloadable.

**SECTION 7. REPORT BY THE OFFICE OF MANAGEMENT AND BUDGET.**

Directs the Office of Management and Budget to audit compliance of public corporations with the requirements of this Act; as well as the effectiveness of the Securities Exchange Commission in meeting the reporting and disclosure requirements of this Act.

**SECTION 8. SEVERABILITY.**

Provides that if any provision of this Act is ruled invalid, then the remainder of the Act shall not be affected.

## ENDNOTES

1. *Citizens United* did not change the law on corporation contributions. Corporate contributions to U.S. federal candidates remain banned. However, corporate contributions to candidates are allowed in many state, local and international elections. *Citizens United* permits unlimited corporate independent expenditures in federal and state elections.
2. See JOINT ECONOMIC COMMITTEE, 106TH CONG., *THE ROOTS OF BROADENED STOCK OWNERSHIP I* (2000), [www.house.gov/jec/tax/stock/stock.pdf](http://www.house.gov/jec/tax/stock/stock.pdf); Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, 2 (2005), <http://www.ici.org/pdf/fm-v14n5.pdf>; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), [http://www.icifactbook.org/pdf/2009\\_factbook.pdf](http://www.icifactbook.org/pdf/2009_factbook.pdf) (“Households are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households’ financial assets at year-end 2008.”).
3. This report is limited in scope and is focused on a subset of corporate entities: *publicly-traded* corporations. This report does not address privately-held corporations, partnerships or sole proprietorships. Furthermore, this report is focused on corporate political spending. Here the phrase “political spending” is meant to include all spending by publicly-traded corporations to influence the outcome of any candidate election or ballot measure, including contributions independent expenditures and funding any electioneering communications. This includes contributions to intermediaries, such as political action committees (PACs), trade associations or nonprofits which are intended to influence the outcome of an election. “Political spending” does not include lobbying.
4. Press Release, Center for Political Accountability, *Shareholders See Risky Corporate Political Behavior As Threat to Shareholder Value, Demand Reform, CPA Poll Finds*, (April 5, 2006), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267> (announcing a “poll found a striking 85 percent [of shareholders] agreed that the ‘lack of transparency and oversight in corporate political activity encourages behavior’ that threatens shareholder value. 94 percent supported disclosure and 84 percent backed board oversight and approval of ‘all direct and indirect [company] political spending.’”).
5. Bruce F. Freed & John C. Richardson, *THE GREEN CANARY: ALERTING SHAREHOLDERS AND PROTECTING THEIR INVESTMENTS* (2005), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/920>; Rajesh Aggarwal, Felix Meschke, & Tracy Wang, *Corporate Political Contributions: Investment or Agency?*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=972670](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670); Deniz Igan, Prachi Mishra, & Thierry Tresselt, *A Fistful of Dollars: Lobbying and the Financial Crisis*, IMF Working Paper, 4 (2009), <http://www.imf.org/external/pubs/ft/wp/2009/wp09287.pdf> (“Our findings indicate that lobbying [by financial service corporations] is associated ex-ante with more risk-taking and ex-post with worse performance... [a] source of moral hazard could be “short-

termism”, whereby lenders lobby to create a regulatory environment that allows them exploit short-term gains.”); *see also* Committee for Economic Development, *Rebuilding Corporate Leadership: How Directors Can Link Long-Term Performance with Public Goals* (2009), [http://www.ced.org/images/library/reports/corporate\\_governance/cgpt3.pdf](http://www.ced.org/images/library/reports/corporate_governance/cgpt3.pdf) (“This report examines how these efforts to build public trust and long-term value have coalesced to encourage many large, global corporations to pay greater attention to their longer-term interests by striking a balance between short-term commercial pursuits and such societal concerns as the environment, labor standards, and human rights.”).

6. GREEN CANARY, *supra* note 5 at 14 (arguing “political contributions can serve as a warning signal for corporate misconduct.”).
7. *See* Marc Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT L. REV. 575, 639 (1989) (noting that concern over the role of corporations in American democracy has a long vintage, arguing “[C]oncern with corporate power over democratic processes in America grew sharply toward the close of the nineteenth century as concentrations of private capital, in the form of corporations and trusts, reached unprecedented size and power. These huge pools of capital raised the frightening prospect that candidates and elections might actually be bought in systematic fashion.”).
8. *See* Daniel Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 1055 (1998), <http://ssrn.com/abstract=794785> (“Corporate speech, then, should be viewed with extreme suspicion. Corporate interference in the political sphere raises an omnipresent specter of impropriety, of a valuable institution stepping out of its proper sphere, of a tool of the people becoming its ruler.”).
9. Claims for breach of fiduciary duty are state law claims. *See* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 840 (2009) (“The determination of a director’s or officer’s fiduciary duty to the corporation and its shareholders is generally governed by the law of the state of incorporation, unless under the circumstances the corporation is deemed to be foreign in name only. In some jurisdictions, a statute articulates the fiduciary obligations of corporate directors and officers to exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the shareholders with that degree of diligence, care and skill that ordinarily prudent person would exercise under similar circumstances in like positions.”).
10. For a more in depth analysis of these issues, *see* Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders’ Rights: Why the U.S. Should Adopt the British Approach* (2009), [http://www.brennancenter.org/content/resource/the\\_campaign\\_finance\\_case\\_for\\_shareholder\\_protection/](http://www.brennancenter.org/content/resource/the_campaign_finance_case_for_shareholder_protection/).
11. *See* Robert S. Chirinko & Daniel J. Wilson, *Can Lower Tax Rates Be Bought? Business Rent-Seeking and Tax Competition Among U.S. States*, Federal Reserve Bank of San Francisco Working Paper Series (Dec. 2009) (“During the 2003 to 2006 period, \$1.5 billion, or nearly \$5 per capita, was contributed by the business sector...to candidates for state offices. Of this

\$1.5 Billion, approximately 33% went to gubernatorial candidates (including lieutenant governor candidates), another 33% to state senate candidates, 21% to state house candidates, and the remaining 12% to candidates for other state offices (e.g., attorney general, state judges.)” (However, this study did not distinguish between corporate PAC and treasury spending.).

12. See CENTER FOR RESPONSIVE POLITICS, TOP NATIONAL DONORS BASED ON COMBINED STATE AND FEDERAL CONTRIBUTIONS, 2007-2008 (2010), [http://www.opensecrets.org/orgs/list\\_stfed.php?order=A](http://www.opensecrets.org/orgs/list_stfed.php?order=A) (showing that top corporate donors gave at the federal and state level); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AMERICAN J. OF INTERNATIONAL L. 1, 24 (1989) (noting “a U.S.-incorporated, foreign-owned company’s PAC could serve as a conduit for foreign funds to U.S. electoral campaigns.”); see also Electoral Commission, *Register of Donations to Political Parties* (2010), <http://registers.electoralcommission.org.uk/regulatory-issues/regdpoliticalparties.cfm> (listing American companies that had contributed to British political parties such as Microsoft, Northern Trust, Kerr Mcgee Oil, and Compaq Computers Ltd., among others).
13. CENTER FOR RESPONSIVE POLITICS, 2008 ELECTION OVERVIEW, <http://www.opensecrets.org/overview/index.php>.
14. U.S. Census, *Table 415 Contributions to Congressional Campaigns by Political Action Committees (PAC) by Type of Committee: 1997 to 2008*, <http://www.census.gov/compendia/statab/2010/tables/10s0415.pdf> (PAC contributions to Congressional candidates were \$387 million and \$140 million were from Corporate PACs).
15. Press Release, Campaign Finance Institute, *Party Conventions’ Financiers Have Spent Nearly \$1.5 billion on Federal Campaign Contributions and Lobbying Since 2005* (Aug. 20, 2008), <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=203> (finding these same donors also spent over \$1.3 billion to lobby the federal government).
16. Ruth Marcus, *‘Judicial Activism’ on Campaign Finance Law*, REAL CLEAR POLITICS, (Aug. 3, 2009), [http://www.realclearpolitics.com/articles/2009/08/03/judicial\\_activism\\_on\\_campaign\\_finance\\_law\\_97746.html](http://www.realclearpolitics.com/articles/2009/08/03/judicial_activism_on_campaign_finance_law_97746.html) (arguing “[w]e don’t want Wal-Mart—at least I don’t— using its purchasing power to buy elections, and we don’t want Wal-Mart funneling money to a nonprofit proxy.”).
17. Greenwood, *supra* note 8, at 1055, (“When [corporate] money enters the political system, it distorts the very regulatory pattern that ensures its own utility. When the pot of money is allowed to influence the rules by which it grows, it will grow faster, thus increasing its ability to influence—setting up a negative feedback cycle and assuring that the political system will be distorted to allow corporations to evade the rules that make them good for all of us (to extract rents, in the economists’ jargon.”).

18. See *McConnell v. FEC*, 540 U.S. 93, 143-44 (2003) (“Of ‘almost equal’ importance has been the Government’s interest in combating the appearance or perception of corruption engendered by large campaign contributions. Take away Congress’ authority to regulate the appearance of undue influence and “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”) (internal citations omitted).
19. 11 C.E.R. 100.6; FED. ELECTION COMM’N, SSFS AND NONCONNECTED PACS (May 2008), <http://www.fec.gov/pages/brochures/ssfnonconnected.shtml>.
20. FED. ELECTION COMM’N, CONTRIBUTION LIMITS FOR 2009-10 (2009), <http://www.fec.gov/info/contriblimits0910.pdf>.
21. See *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (explaining “the [corporate treasury spending] ban has always done further duty in protecting ‘the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.’”) (internal citations omitted).
22. Nicole Albertson-Nuanes, *Give to Get? Financial Institutions That Made Hefty Campaign Donations Score Big Bucks From The Government*, 1 (Mar. 19, 2009), [http://www.followthemoney.org/press/Reports/GIVE\\_TO\\_GET\\_TARP\\_Recipients.pdf?PHPSESSID=fa738af7f3dba55d269db58a057e3f7a](http://www.followthemoney.org/press/Reports/GIVE_TO_GET_TARP_Recipients.pdf?PHPSESSID=fa738af7f3dba55d269db58a057e3f7a) (noting 75 financial institutions that received TARP bailout funds had given contributions valued at \$20.4 million to state level candidates, party committees and ballot measure committees in all 50 states over the 7-year study period.); Chirinko & Wilson, *supra* note 11, at 3 (Finding “the economic value of a \$1 business campaign contribution in terms of lower state corporate taxes is nearly \$4.”).
23. The Aggarwal study conforms with international studies of the relationships between political connections and shareholder value. Mara Faccio, *The Characteristics of Politically Connected Firms* (Oct. 2006) (finding in 47 countries, companies with political connections underperform non-connected companies); Mara Faccio, Ronald Masulis & John J. McConnell, *Political Connections and Corporate Bailouts* (Mar. 2005) (finding in 35 countries politically-connected firms are significantly more likely to be bailed out than similar non-connected firms); Paul K. Chaney, Mara Faccio & David Parsley, *The Quality of Accounting Information in Politically Connected Firms* (Jun. 2008) (finding in 20 countries, quality of earnings reported by politically connected firms is significantly poorer than that of similar non-connected firms.); and Marianne Bertrand, Francis Kramarz, Antoinette Schoar & David Thesmar, *Politically Connected CEOs and Corporate Outcomes: Evidence from France*, 28 (2004) (In France “[w]e find that firms managed by [politically] connected CEOs have, if anything, lower rates of return on assets, than those managed by non-connected CEOs.”).

24. See Aggarwal et al., *supra* note 5, which included corporate treasury money spent on politics pre-2002, the year McCain-Feingold was enacted closing the corporate soft-money loophole. Moreover, this study found that firms who make political donations have lower excess returns in the year following an election than firms that did not donate at all. *Id.* at 34 (revealing “[e]ven within the top five donating industries, including banking, financial trading, and utilities that have undergone deregulation during our sample period, donors have lower excess returns than non-donors.”). Excess returns are defined as a firm’s one-year buy and hold returns minus their expected return for the year as measured from the Wednesday following election day to the first Monday of November in the following year. *Id.* at 17. The study found that in the median firm a \$10,000 political donation is associated with a loss of \$1.73 million. Therefore, Aggarwal and his co-authors conclude “shareholder value could be hurt by such wasteful political spending.” *Id.* at 18; *id.* at 23 (finding “the more a firm donates, the lower the excess returns.”); *id.* at 3-4 (stating “[g]iven the magnitude of the destruction of shareholder value that we document, it is more plausibly the case that corporate political contributions are symptomatic of wider agency problems in the firm.”).
25. *Id.* at 39.
26. Lance E. Lindblom, “The Price of Politics,” PHARMACEUTICAL EXECUTIVE, (October 2004) (“Some [corporate political] contributions are intended to support the industry business model, while others simply back personal or managerial interests.”); see also the webcast of a 2007 speech by Mr. Lindblom at Harvard available here: Andrew Tuch, *The Power of Proxies and Shareholder Resolutions*, HLS Forum on Corporate Governance and Financial Regulation (Oct. 19, 2007), <http://blogs.law.harvard.edu/corpgov/2007/10/19/the-power-of-proxies-and-shareholder-resolutions/>.
27. GREEN CANARY, *supra* note 5, at 5.
28. “Biggest Chapter 11 Cases,” CNBC (Sept. 17, 2008), <http://www.cnbc.com/id/26720522?slide=1>; Al Hunt, “Enron’s One Good Return: Political Investments,” WALL STREET JOURNAL, (Jan. 31, 2002) (arguing Enron “played with funny money. But their political investment helped prolong the Ponzi scheme.”).
29. “Qwest Isn’t As Hale As It Looks,” BUSINESSWEEK (Feb. 6, 2006), [http://www.businessweek.com/magazine/content/06\\_06/b3970100.htm](http://www.businessweek.com/magazine/content/06_06/b3970100.htm) (“Four years ago, Qwest Communications International Inc. was on bankruptcy’s doorstep”); “Executives Accused of Plan to Loot Utility,” N.Y. TIMES (Dec. 5, 2003) (noting Westar was “pushed [] to the brink of bankruptcy with \$3 billion in debt”).
30. European Corporate Governance Service, *Blue-Wash* (undated), <http://www.ecgs.net/news/story216.html>.
31. *Citizens United v. FEC*, No. 08-205, slip opinion at 54 (2010).



32. Domini Social Investments, *Social Impact Update Forth Quarter 2004* (2004) (“Despite significant risks—to shareholder value and to the integrity of our political system—data on corporate political contributions remains extremely difficult to obtain.”).
33. See Adam Winkler, ‘*Other People’s Money*’: Corporations, Agency Costs, and Campaign Finance Law, 92 GEORGETOWN L. J. 871, 893-94 (June 2004); Jennifer S. Taub, *Able but Not Willing: the Failure of Mutual Fund Advisers to Advocate for Shareholders’ Rights*, 34 J. OF CORPORATION L. 101, 102 (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1066831](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066831) (“Approximately 77.7 million individuals in the United States invest in equities through stock mutual funds.”); *id.* at 105 (“Investors who are the risk-takers are now pushed further away from the decisionmakers, and the agency problem is amplified.”).
34. Independent spending and funding of electioneering communications are also reported to the FEC and the FCC, respectively. See FED. ELECTION COMM’N, ELECTRONICALLY FILED INDEPENDENT EXPENDITURES (2009), [http://fec.gov/finance/disclosure/ie\\_reports.shtml](http://fec.gov/finance/disclosure/ie_reports.shtml); FCC, ELECTIONEERING COMMUNICATIONS DATABASE (ECD) (2009), <http://gullfoss2.fcc.gov/ecd/>.
35. FED. ELECTION COMM’N, *Contributions Received by Abraham Lincoln Leadership Political Action Committee*, [http://query.nictusa.com/cgi-bin/com\\_rcvd/C00357095/](http://query.nictusa.com/cgi-bin/com_rcvd/C00357095/); *Contributions Received by Democracy Believers Political Action Committee*, [http://query.nictusa.com/cgi-bin/com\\_rcvd/C00382036/](http://query.nictusa.com/cgi-bin/com_rcvd/C00382036/); *Contributions Received by Freedom & Democracy Fund*, [http://query.nictusa.com/cgi-bin/com\\_rcvd/C00409987/](http://query.nictusa.com/cgi-bin/com_rcvd/C00409987/).
36. See Campaign Disclosure Project, Grading State Disclosure (2008), <http://www.campaigndisclosure.org/gradingstate/index.html>.
37. Jonathan Peterson, “More Firms’ Political Ties Put Online,” L.A. TIMES (Mar. 20, 2006), <http://articles.latimes.com/2006/mar/20/business/fi-donate20> (“Campaign contributions are a matter of public record, but getting a complete picture of a company’s political giving is difficult because the donations can be scattered over scores of individual campaign finance reports at the local, state and federal levels.”).
38. *Mutual Protection: Why Mutual Funds Should Embrace Disclosure of Corporate Political Contributions/Common Cause and Center for Political Accountability*, ALI-ABA COURSE OF STUDY MATERIALS 11 (Dec. 2005).
39. Bruce F. Freed & Jamie Carroll, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING I (2006), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932>.
40. *Id.* at 1-2 (“Trade associations are now significant channels for company political money that runs into the tens if not hundreds of millions of dollars. In 2004, more than \$100 million was spent by just six trade associations on political and lobbying activities,

including contributions to political committees and candidates. None of this spending is required to be disclosed by the contributing corporations.”).

41. S. Rep. No. 95-114, 95th Cong., 1st Sess. 1977, 1977 U.S.C.C.A.N. 4098, 1977 WL 16144 (noting “Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars. These revelations have had severe adverse effects. Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.”).
42. John R. Evans, “Of Boycotts and Bribery, and Corporate Accountability,” *Securities and Exchange Commission News*, 9 (Oct. 5, 1976), <http://www.sec.gov/news/speech/1976/100576evans.pdf>.
43. Bruce F. Freed & John C. Richardson, *Company Political Activity Requires Director Oversight*, ALI-ABA COURSE OF STUDY MATERIALS, 3 (Dec. 2005).
44. *Id.* at 2-3; see also Victor Brudney, *Business Corporations and Stockholders’ Rights under the First Amendment*, 91 YALE L. J. 235, 237 (1981) (stating “[t]he use of that wealth and power by corporate management to move government toward goals that management favors—with little or no formal consultation with investors—is also a phenomenon that is generally undeniable.”); *id.* at 239-40 (noting “unless investor approval is obtained, the funds of some investors are being used to support views they do not favor.”).
45. Jill Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006).
46. The lack of board approval is the norm. However two states (Louisiana and Missouri) do require board approval of political donations before they are made. See La. Rev. Stat. Ann. §18:1505.2(F); Mo. Ann. Stat. §130.029.
47. Ira M. Millstein, Holly J. Gregory & Rebecca C. Grapsas, Weil, Gotshal & Manges LLP, *Rethinking Board and Shareholder Engagement in 2008* (January 2008), [http://blogs.law.harvard.edu/corpgov/files/2008/01/gregory\\_millstein\\_corporate-governance-advisory-memo-jan-2008.pdf](http://blogs.law.harvard.edu/corpgov/files/2008/01/gregory_millstein_corporate-governance-advisory-memo-jan-2008.pdf).
48. *Citizens United v. FEC*, No. 08-205, slip opinion at 46 (2010).
49. An earlier Supreme Court acknowledged that investment is distinct from political engagement. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-58 (1986) (citations omitted). (“The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability

of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”).

50. *Marsili v. Pacific Gas & Elec. Co.*, 51 Cal. App. 3d 313, 322 (Cal. Ct. App. 1975) (characterizing a corporate political contribution as a good faith business decision under the business judgment rule); *Simon v. Sw. La. Elec. Membership Corp.*, 267 So.2d 757, 758-59 (La. Ct. App. 1972) (rejecting plaintiff's claim because nonprofit corporation's political activities were illegal under state law rather than ultra vires).
51. Thomas W. Joo, *People of Color, Women, and the Public Corporation: Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 959 (2005) (citation omitted).
52. Only Louisiana and Missouri corporations require board approval of political expenditures. See *supra* note 46.
53. Transcript of Re-argument at 57-59, *Citizens United v. FEC*, No. 08-205 (Sept. 9, 2009), [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-205%5BReargued%5D.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf)
54. Under British law political donations include: “(a) any gift to the party of money or other property; (b) any sponsorship provided in relation to the party; (c) any subscription or other fee paid for affiliation to, or membership of, the party; (d) any money spent (otherwise than by or on behalf of the party) in paying any expenses incurred directly or indirectly by the party; (e) any money lent to the party otherwise than on commercial terms; (f) the provision otherwise than on commercial terms of any property, services or facilities for the use or benefit of the party (including the services of any person).” Political Parties, Elections and Referendums Act, c. 41 §§ 50 (2000), [http://www.opsi.gov.uk/Acts/acts2000/ukpga\\_20000041\\_en\\_1](http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000041_en_1). And it goes without saying, Britain has a Parliamentary system so donations typically go to political parties.
55. Certain authors in Britain have argued corporations should not be able to make political expenditures. Austin Mitchell & Prem Sikka, ASSOCIATION FOR ACCOUNTANCY & BUSINESS AFFAIRS, *TAMING THE CORPORATION* (2005), [visar.csustan.edu/aaba/TamingtheCorporations.pdf](http://visar.csustan.edu/aaba/TamingtheCorporations.pdf). (arguing “[c]ompanies should be banned from making any political donations to individual politicians or parties.”).
56. Political Parties, Elections and Referendums Act, *supra* note 54, c. 41 §§ 139, 140, sched. 19; see also Explanatory Notes to Political Parties, Elections and Referendums Act (2000), c. 41, [http://www.opsi.gov.uk/ACTS/acts2000/en/ukpgaen\\_20000041\\_en\\_1](http://www.opsi.gov.uk/ACTS/acts2000/en/ukpgaen_20000041_en_1). The Companies Act was amended again in 2006. As a result of the 2006 amendments, donations to trade unions are exempt. In addition, directors are jointly and severally liable for any unauthorized political expenditures plus interest. Companies Act c. 46, §§ 369, 374 (2006), [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga\\_20060046\\_en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf); see also Companies Act 2006 Regulatory Assessment (2007), <http://www.berr.gov.uk/files/file29937.pdf>.

57. Aileen Walker, Parliament and Constitution Centre House of Commons Library, *The Political Parties, Elections and Referendums Bill – Donations*, 9 (Jan. 7, 2000), <http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf>.
58. Home Department, *THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM: THE GOVERNMENT'S PROPOSALS FOR LEGISLATION IN RESPONSE TO THE FIFTH REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE 1999-2000*, <http://www.archive.official-documents.co.uk/document/cm44/4413/4413-00.htm>.
59. COMMITTEE ON STANDARDS IN PUBLIC LIFE, *THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM*, iii (1998), <http://www.archive.official-documents.co.uk/document/cm40/4057/volume-1/volume-1.pdf>.
60. *Id.* at 86.
61. Political Parties, Elections and Referendums Act, *supra* note 54; *see also* ELECTORAL COMMISSION, *GUIDANCE TO COMPANIES: POLITICAL DONATIONS AND LENDING* (2007), [http://www.electoralcommission.org.uk/\\_\\_data/assets/electoral\\_commission\\_pdf\\_file/0014/13703/Companies-Guidance-Final1\\_27776-20443\\_\\_E\\_\\_N\\_\\_S\\_\\_W\\_\\_.pdf](http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0014/13703/Companies-Guidance-Final1_27776-20443__E__N__S__W__.pdf).
62. The original reporting threshold in the 2000 law was £200. The amount was later raised to £2,000 in 2007 under secondary legislation. *See* DEPARTMENT FOR BUSINESS ENTERPRISE & REGULATORY REFORM, *GOVERNMENT RESPONSE TO CONSULTATION ON THE COMPANIES ACT 2006 – ACCOUNTING AND REPORTING REGULATIONS* (2007), <http://www.berr.gov.uk/files/file40480.doc>.
63. Companies Act, *supra* note 56; *see also* Companies Act 2006: Explanatory Notes (2006), [http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen\\_20060046\\_en.pdf](http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060046_en.pdf).
64. Political Parties, Elections and Referendums Act, *supra* note 54.
65. Companies Act, *supra* note 56, at § 369.
66. The Companies (Interest Rate for Unauthorised Political Donation or Expenditure) Regulations 2007, Statutory Instruments 2007 No. 2242 (July 25, 2007), [http://www.opsi.gov.uk/si/si2007/uksi\\_20072242\\_en\\_1](http://www.opsi.gov.uk/si/si2007/uksi_20072242_en_1).
67. *See e.g.*, AstraZeneca, *Directors' Report: Business Review: Corporate Governance: Other Matters*, [http://www.astrazeneca-annualreports.com/2007/business\\_review/governance/other\\_matters.asp](http://www.astrazeneca-annualreports.com/2007/business_review/governance/other_matters.asp) (reporting "AstraZeneca's US legal entities made contributions amounting in aggregate to \$321,645 (2006 \$416,675) to state political party committees and to campaign committees of various state candidates affiliated with the major parties."); National Grid, *Directors' Report for the Year Ended 31 March 2007* (May 16, 2007), [http://www.nationalgrid.com/annualreports/2007/06\\_dir\\_reports/dir\\_report.html](http://www.nationalgrid.com/annualreports/2007/06_dir_reports/dir_report.html) (reporting "National Grid USA and certain subsidiaries made political donations of \$100,000 (£52,289) during the year. National Grid USA's political action committees,

funded partly by voluntary employee contributions, gave \$149,709 (£78,282) to political and campaign committees in 2006/07.”).

68. Stephanie Kirchgaessner, “BAE Among Top Foreign Donors to US Political Candidates,” *FINANCIAL TIMES*, August 22, 2006 (noting “BAE, the British defence group, has emerged as one of the most powerful corporate contributors to candidates in the current US election cycle, ranking number 18 in a list of the biggest corporate donors.”); “U.S. Elections Got More Foreign Cash—PAC’s of Overseas Companies Gave \$2.3 Million in 1986 Congress Campaigns,” *N.Y. TIMES*, A27 (May 24, 1987).
69. Patrick Hosking, “Business Big Shot: Peter Buckley of Caledonia Investments,” *THE TIMES*, (May 30, 2008), [http://business.timesonline.co.uk/tol/business/movers\\_and\\_shakers/article4029538.ece](http://business.timesonline.co.uk/tol/business/movers_and_shakers/article4029538.ece).
70. Press Release, Labour Research Department, *Tories Still Get Corporate Millions* (June 2, 2001), <http://www.lrd.org.uk/issue.php?pagid=1&issueid=362> (“The Conservative Party has received a total of £1.74 million in company donations since the last election from 62 companies...just 12 corporate donations [went] to Labour totalling £191,500.”); Labour Research Department, *Party Funding*, *LABOUR RESEARCH 11* (Oct. 2003), <http://www.lrd.org.uk/db/downloads/lr0310.pdf> (Companies gave £1,161,644 the Conservative Party and £245,690 to the Labour Party in the 2002-2003 election cycle.).
71. Lisa E. Klien, *On the Brink of Reform: Political Party Funding in Britain*, 31 *CASE W. RES. J. INT’L L.* 1, 13 (1999).
72. COMMITTEE ON STANDARDS IN PUBLIC LIFE, *supra* note 58 (noting £47,000 from the Caparo Group, £30,000 from GLC Limited, and £21,000 from the Mirror Group for the Labour Party.).
73. *Id.* at 52, ¶ 597 (vol. 2 1998).
74. Press Release, Labour Research Department, *Tory Donations Take a Dive* (Nov. 19, 1998), <http://www.lrd.org.uk/issue.php?pagid=1&issueid=330>.
75. *See supra* note 70.
76. *See* The Co-operative Group, *Annual Report and Accounts 2008*, 36 (2008), [http://www.co-operative.coop/Corporate/PDFs/Annual\\_Report\\_2008.pdf](http://www.co-operative.coop/Corporate/PDFs/Annual_Report_2008.pdf) (“In 2008 an annual subscription of £476,000 (2007: £646,103) was made to the Co-operative Party.”).
77. Michael Pinto-Duschinsky, *British Party Funding 1913-87*, *PARLIAMENTARY AFFAIRS*, April 1989, at 210 (listing as £50,000 or over donors: George Weston Holdings, British & Commonwealth Holdings, Taylor Woodrow, Rugarth Investment Trust, Hanson Trust, P & O, United Biscuits, Allied Lyons, Trafalgar House, Plessey, Whitbread, Consolidated Goldfields, Racal, Guardian Royal Exchange, Sun Alliance, Willis Faber,

Hambros, General Accident, Newarthill, Trust House Forte, Baring, British Airways, General Electric, Glaxo Holdings, Rolls Royce, Royal Insurance, Unigate, and Williams Holdings).

78. See companies listed *supra* note 77 as £50,000 or over donors. But when these companies are searched in the British Electoral Commission's database of campaign contributors from 2001-2009, only one donation from British Airways in 2001 for £1,450 is listed. Electoral Commission, *Register of Donations to Political Parties* (2010), <http://registers.electoralcommission.org.uk/regulatory-issues/regdpoliticalparties.cfm>.
79. For example, the resolution passed at AstraZeneca stated the company could "make donations to political parties; and make donations to political organisations other than political parties; and incur political expenditure; not exceed[ing] \$250,000..." AstraZeneca, *AstraZeneca Notice Of Annual General Meeting 2009 and Shareholders' Circular*, 6 (2009), [http://www.astrazeneca.com/\\_mshost3690701/content/resources/media/investors/2009-AGM/AZ\\_NoM\\_EN.pdf](http://www.astrazeneca.com/_mshost3690701/content/resources/media/investors/2009-AGM/AZ_NoM_EN.pdf). Other companies had far more modest political budgets. See e.g., 3i Group PLC, *Notice of Annual General Meeting 2007*, 2 (2007), [http://www.3igroup.com/pdf/AGM\\_-\\_notice\\_of\\_AGM\\_2007.pdf](http://www.3igroup.com/pdf/AGM_-_notice_of_AGM_2007.pdf) (requesting a political budget of £12,000 for a subsidiary); Balfour Beatty, *Annual General Meeting 2009 and Separate Class Meeting of Preference Shareholders*, 4 (2009), <http://www.balfourbeatty.com/bby/investors/shinfo/agm/2009/agm09.pdf> (requesting a political budget of £25,000 for the coming year).
80. BP PLC, *Notice of BP Annual General Meeting 2007*, 10 (2007), [http://www.bp.com/liveassets/bp\\_internet/globalbp/STAGING/home\\_assets/IC\\_SHMV07\\_BP\\_notice\\_of\\_meeting\\_2007.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/home_assets/IC_SHMV07_BP_notice_of_meeting_2007.pdf).
81. British American Tobacco, *Annual General Meeting 2009*, 5 (2009), [http://www.bat.com/group/sites/uk\\_\\_3mnfen.nsf/vwPagesWebLive/DO57YMK7/\\$FILE/medMD7QJMDX.pdf?openelement](http://www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO57YMK7/$FILE/medMD7QJMDX.pdf?openelement) ("At its Annual General Meeting in April 2005, the Company was given authority to make donations to EU political organisations and incur EU political expenditure ... for a period of four years and was subject to caps of £1 million on donations to EU political organisations and £1 million on political expenditure during that period.").
82. Northumbrian Water Group PLC, *Notice of Annual General Meeting 2007*, 2 (2007), <http://www.nwg.co.uk/agmnotice07.pdf> ("Includ[ing] attending Party Conferences, as these provide the best opportunity to meet a range of stakeholders, both national and local, to explain our activities, as well as local meetings with MPs, MEPs and their agents. The costs associated with these activities during 2006/07 were as follows: Labour £7,585, Liberal Democrats £2,293, Conservative £2,303 [for a] Total £12,181.").
83. ITV PLC, *Report and Accounts 2008*, 44 (2008), [2008.itv.ar.ry.com/action/printBasket/?sectionId=26443](http://2008.itv.ar.ry.com/action/printBasket/?sectionId=26443); see also Tesco PLC, *Regulatory News*, 30/06/2008, <http://>

[www.tescopl.com/plc/ir/rns/rnsitem?id=1214847200nRn3d9573X&t=popup\\_rns](http://www.tescopl.com/plc/ir/rns/rnsitem?id=1214847200nRn3d9573X&t=popup_rns)  
 ("During the year, the Group made contributions of £45,023 (2007 - £41,608) in the form of sponsorship for political events: Labour Party £13,040; Liberal Democrat Party £5,850; Conservative Party £5,786; Scottish Labour Party £500; Scottish National Party £2,000; Fine Gael £1,397; Plaid Cymru £450; trade unions £16,000.).

84. Caledonia Investments PLC, *Letter from the Chairman and Notice of 2008 Annual General Meeting*, 9 (2008), <http://www.caledonia.com/docs/AGM08.pdf>; *see also* Caledonia Investments PLC, Caledonia Investments plc: Results of Annual General Meeting, 1 (2008), <http://www.caledonia.com/docs/Result%20of%20AGM%202008.pdf>; Richard Wachman, Caledonia Set for Revolt on Plan to Donate to the Tories, *THE OBSERVER* (July 19, 2009), <http://www.guardian.co.uk/business/2009/jul/19/caledonia-investments-political-donations-pirc>.
85. British Airways, *2008/09 Annual Report and Accounts*, 57 (2009), [http://www.britishairways.com/cms/global/microsites/ba\\_reports0809/pdfs/BA\\_AR\\_2008\\_09.pdf](http://www.britishairways.com/cms/global/microsites/ba_reports0809/pdfs/BA_AR_2008_09.pdf).
86. HMV Group PLC, *Annual Report and Accounts 2009*, 42 (2009), [http://www.hmvgroup.com/files/1302/HMV\\_final1.pdf](http://www.hmvgroup.com/files/1302/HMV_final1.pdf).
87. Burberry Group PLC, *Annual Report 2008/09*, 57 (2009), [http://smartpdf.blacksunplc.com/burberry2008-09ara/Burberry\\_2008-09\\_AnnualReport.pdf](http://smartpdf.blacksunplc.com/burberry2008-09ara/Burberry_2008-09_AnnualReport.pdf).
88. GlaxoSmithKline, *Political Contributions Policy*, 2 (2009), <http://www.gsk.com/about/corp-gov/Policy-Political-Contributions.pdf>.
89. Cadbury PLC, *Annual Report & Accounts 2008*, 55 (2009), [http://cadburyar2008.production.investis.com/-/media/Files/C/cadbury-ar-2008/pdf/cadbury\\_ra\\_13mb\\_compressed.ashx](http://cadburyar2008.production.investis.com/-/media/Files/C/cadbury-ar-2008/pdf/cadbury_ra_13mb_compressed.ashx).
90. *See* South Yorkshire Pensions Authority, *South Yorkshire Pension Fund Corporate Governance Policy: Voting Guidelines*, 3 (2005), [http://www.southyorks.gov.uk/embedded\\_object.asp?docid=1397&doclib](http://www.southyorks.gov.uk/embedded_object.asp?docid=1397&doclib) (stating the pension's policy is to "[v]ote against all resolutions to approve political donations as this is an inappropriate use of shareholder funds."); London Borough of Bexley Pension Fund, *Statement of Investment Principles*, 35 (2008), <http://www.yourpension.org.uk/Agencies/Bexley/docs/pdf/SIP%2008.pdf> (stating "[i]t is inappropriate for a company to make such [political] donations."); London Borough of Sutton Pension Fund, *Statement of Investment Principles*, <http://www.sutton.gov.uk/CHttpHandler.ashx?id=876&p=0> ("We normally consider any political donations to be a misuse of shareholders' funds and will vote against resolutions proposing them.").
91. *See supra* note 79; *supra* note 81.
92. *See* West Midlands Pension Fund, *Corporate Governance Proxy Voting Activity*, 1-2 (2004), [http://www.wmpfonline.com/pdfs/activity0604\\_0804.pdf](http://www.wmpfonline.com/pdfs/activity0604_0804.pdf).

93. Ben Webster, Unhappy Landing for MPs' Parking Perk, *THE TIMES* (July 28, 2004) <https://www.timesonline.co.uk/article/0,,2-1193813,00.html>.
94. *Id.*
95. See BAA PLC, *Annual Report 2004/05*, 47 (2005), <http://www.heathrowairport.com/assets/B2CPortal/Static%20Files/BAAAnnualReport2004-05.pdf> ("BAA no longer provides free airport car parking passes for parliamentarians. The [passes were] not renewed after the general election on 5 May 2005 following widespread consultation with shareholders...").
96. Press Release, Center for Political Accountability, *New Companies Bring Political Disclosure to Nearly Half of Trendsetting S&P 100*, <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/2636>.
97. Center for Political Accountability, "About Us," <http://www.politicalaccountability.net/content.asp?contentid=406> ("Working with more than 20 shareholder advocates, the CPA is the only group to directly engage companies to improve disclosure and oversight of their political spending.").
98. Press Release, *Interfaith Center on Corporate Responsibility, Religious Investors Open Campaign to Press Drug Companies to Disclose Political Spending* (Dec. 9, 2004), [http://www.iccr.org/news/press\\_releases/2004/pr\\_contribs120904.htm](http://www.iccr.org/news/press_releases/2004/pr_contribs120904.htm).
99. Susannah Goodman, Common Cause, *Mutual Protection: Why Mutual Funds Should Embrace Disclosure of Corporate Political Contributions* (2005), <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/MUTUAL%20FUND%20REPORT%202-15-05.PDF>.
100. Nathan Cummings Foundation, *Shareholder Resolutions & Corporate Engagement 2003-2009*, (undated), [http://www.nathancummings.org/shareholders/shareholder\\_resolutions.html](http://www.nathancummings.org/shareholders/shareholder_resolutions.html).
101. If particular candidates or ballot measures are known to the company at the time of the AGM, then those particular candidates and ballot measures should be mentioned in the language of the resolution.
102. *Citizens United v. FEC*, No. 08-205, slip opinion at 54 (2010).
103. The data in this chart comes from each company's respective annual report.





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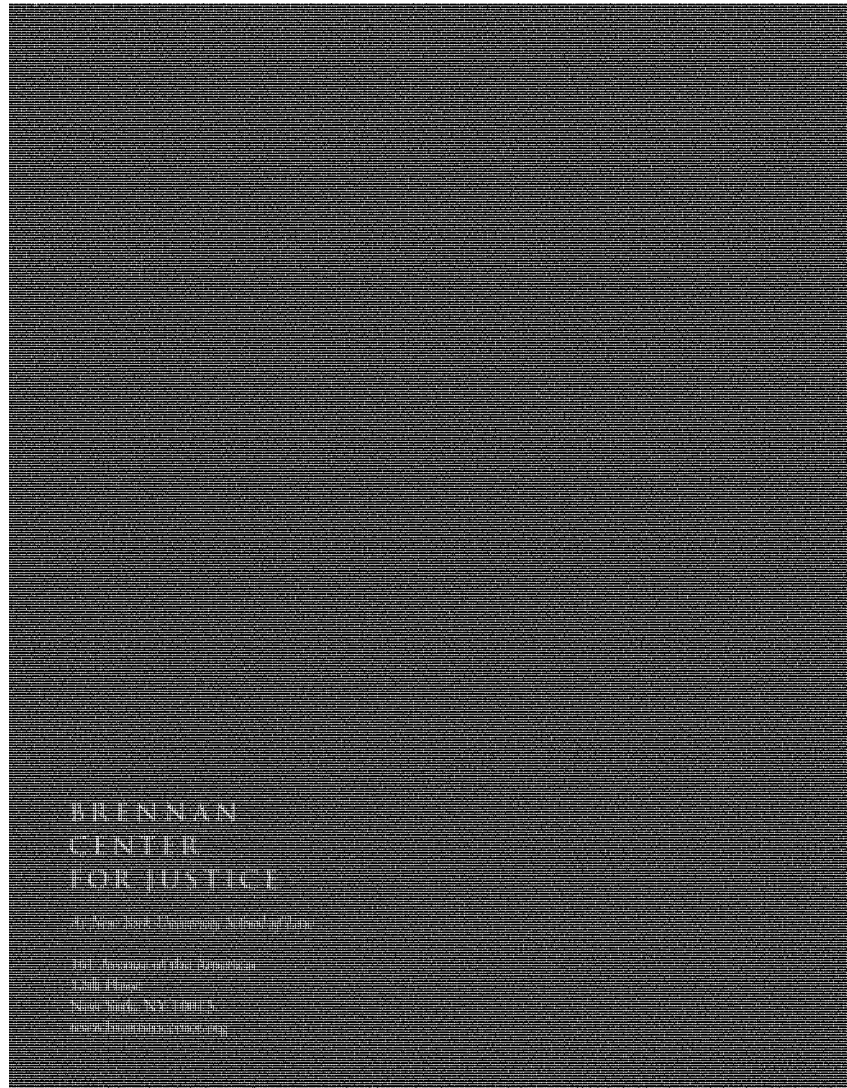
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February 2, 2010

House Administration Committee  
1309 Longworth House Office Building  
Washington, DC 20510

Dear Chairman Brady, Ranking Minority Member Lungren and Members of the Committee,

The American people are experiencing a crisis in confidence in the ability of their elected government to act in the public's best interest. A new Wall Street Journal/NBC survey of voters found that 70% of voters think the government isn't working well, and 84% believe "the special interests have too much influence over legislation." And a national poll we commissioned last year found that 79% of voters believe large campaign contributions will prevent Congress from tackling the biggest issues facing the nation, like health care, climate change and the economic crisis. Americans are angry at the lack of progress in Washington.

Last month's decision from the U.S. Supreme Court in the *Citizens United* case will only make an already bad situation worse. The Court turned its back on 100 years of law and its own precedents to strike down federal prohibitions on independent political spending by corporations and unions, at the same time pulling the plug on similar laws in 24 states. That much we expected. But the Court also declared outright – beyond overruling *Austin* and *McConnell* – that corporate expenditures *cannot* corrupt elected officials and that appearance of influence *will not* undermine public faith in our democracy. We at Common Cause were stunned by the sweeping nature of these proclamations, made without any factual record on those issues for the Court to review.

This is judicial activism at its worst. The effect of the decision is likely to let loose a flood of corporate and union independent spending in the future elections, trigger a fundraising arms race by candidates fearful of that spending, and further reduce public trust in our democracy.

Just one week before the *Citizens United* decision, the U.S. Chamber of Commerce issued a press release threatening to spend an unprecedented amount of money in the 2010 elections to defeat Members of Congress who did not side with their agenda. Last fall, PhRMA announced a \$150 million advertising campaign to support a health care plan (without a public insurance option) – more than the \$140 million spent by all 55 winners of hot congressional races in 2008 combined. That's one trade association on one bill. Now imagine what America

looks like when powerful interests are free to tap their profits to influence elections, and decide to spend as much on campaigns as they do on lobbying.

Although the *Citizens United* decision will affect both corporate and union spending, there is no doubt where the advantage lies. In the last election cycle, corporations outspent unions 4 to 1 when it came to the highly regulated field of PAC spending, where money has to be aggregated from individuals in limited amounts. During the same period, corporations outspent unions 61 to 1 when it came to lobbying Congress (\$5.2 billion for corporations, compared to \$84.4 million for labor).

This Committee will likely hear a wide variety of legislative proposals to mitigate the impact of the *Citizens United* decision, and we encourage you to give them careful consideration. However, given this Court's narrow focus on *quid pro quo* corruption and its ideological approach to campaign finance law, there is very little you can do from a regulatory, limits-based approach to restore the status quo, let alone take meaningful steps to increase public confidence in Washington.

Common Cause supports a comprehensive package of reforms to address the effects of the *Citizens United* decision – and the preexisting condition of big money dominance in federal elections and the halls of Congress. We believe that a reform package should:

1. ***Fair Elections.*** Congress should enact a new system for 21st Century elections that allows candidates who agree to low contribution limits to run competitive campaigns on a blend of small donations and limited public funds.
2. ***Prohibit political spending by foreign-owned domestic corporations.*** The *Citizens United* decision opens a loophole that would allow foreign-owned corporations chartered in the United States to spend unlimited amounts of money to influence our elections. That loophole must be closed.
3. ***Require shareholder approval of political expenditures.***
4. ***Prohibit political expenditures by corporations that receive federal government contracts, earmarks, grants, tax breaks or subsidies.***
5. ***Strengthen coordination rules, to ensure that “independent” expenditures are truly independent.***
6. ***Strengthen disclosure rules.*** Independent expenditures should be disclosed electronically within 24 hours in a manner accessible to candidates, the media and the public. CEO's should be required to “stand by their ads” just like candidates, and corporations that collect money for political expenditures should provide attribution for their top three donors, in order to prevent evasion of disclosure by “Astroturf” entities. FCC advertising logs should be made available on the Internet.
7. ***Pay-to-Play reforms.*** Congress should move quickly to dispel the public's perception of special interest dominance in Washington by enacting low contribution and

solicitation limits for lobbyists and lobbyist employers, and banning earmarks for campaign contributors.

The best defense is a good offense. We urge you to seize this moment to lay the groundwork for a new generation of elections that raise up the voices of American voters and free elected officials from their dependence on wealthy special interests. If what we are witnessing is a return to the “Wild West” of American elections, then allowing candidates to run vigorous campaigns on a blend of small contributions and limited public funds becomes an even more attractive alternative than it is now. In a world where there are no practical limits on political spending by organized wealthy interests, the Fair Elections Now Act (S. 752 and H.R. 1826) offers a floor for competitive campaigns and matching funds to ensure that concentrated wealth cannot drown out the voices of Main Street.

The problem is not so much the amount we spend on political campaigns – columnist George Will likes to remind us that we spend more on potato chips than elections each year – as it is who pays for them, what they get in return, and how that distorts public policy and spending priorities. Keeping our elected officials dependent on the very same wealthy special interests they are supposed to regulate undermines public confidence in their government and its ability to tackle the tough issues that face the nation. And letting the interests who stand to gain from billions in federal spending and bailouts give politicians campaign cash undermines public faith in government’s ability to spend money wisely.

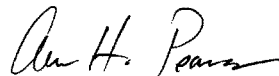
Common Cause urges you to make the Fair Elections Now Act part of any reform package.

Thank you for rapid attention to this pressing crisis in American democracy, and for this opportunity to share our views with you.

Sincerely,



Bob Edgar  
President & CEO  
Common Cause



Arn H. Pearson, Esq.  
Vice President for Programs  
Common Cause



215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

Feb. 3, 2010

The Hon. Robert Brady  
Chairman, 1309 LHOB  
The Hon. Daniel Lungren  
Ranking Member, 1313 LHOB  
Committee on House Administration  
House of Representatives  
Washington, D.C. 20515

**RE: Testimony submitted on behalf of Public Citizen on *Citizen United v. FEC***

Dear Chairman and Ranking Member:

Public Citizen is pleased that the Committee on House Administration is holding a hearing in recognition of the danger to our democratic form of governance posed by the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*. We respectfully submit testimony to the Committee on the scope of the problem and on appropriate legislative and constitutional responses to the Court's decision.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in *Citizens United*, with Public Citizen attorney Scott Nelson serving as co-counsel for the key congressional sponsors of the Bipartisan Campaign Reform Act (BCRA) as amicus curiae.

#### **Background on *Citizens United***

On January 21, 2010, the Supreme Court unleashed a flood of corporate money into our political system by announcing, contrary to long-standing precedents, that corporations have a constitutional right to spend unlimited amounts of money to promote or defeat candidates.

The court explicitly overruled two existing Supreme Court decisions. In *Austin v. Michigan Chamber of Commerce*, the Court held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. *McConnell v. Federal Election Commission* applied that principle to uphold BCRA's restrictions on "electioneering communications," that is, corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overrules *Austin* and *McConnell*. The *Citizens United* decision also effectively negates parts of the Court's 2007 ruling in *Wisconsin Right to Life v. Federal Election Commission*.

By overruling these decisions, the Court has opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

There is nothing judicious about this decision. Reversing well-established laws and judicial precedents barring direct corporate financing of elections is a radical affront to American political culture and poses grave dangers to the integrity of our democracy.

### **A Massive Influx of New Corporate Money in Elections**

It is impossible to predict how much corporate money will flood into our elections in a virtually unregulated system; the country has never faced a similar situation. Nevertheless, it is reasonable to assume that the amount will be very substantial indeed – and possibly overwhelming in races of particular interest to the business or labor communities.

Special interest groups funded primarily by corporate money spent, by conservative estimates, about \$50 million on TV ads promoting or attacking federal candidates in the last two months of the 2000 election, up from \$11 million just two years earlier. Corporations and unions chipped in another \$500 million in “soft money” contributions in each of the 2000 and 2002 election cycles, due to a loophole in federal election law.

These loopholes were largely closed in 2002 with passage of BCRA, which added two powerful provisions to the campaign finance laws: First, broadcast ads that mention a candidate, target the candidate's voting constituency and air within 60 days of a general election could not be paid for by corporate or union funds. Second, soft money contributions to parties and federal candidates are prohibited.

Although the Rehnquist Court upheld BCRA almost in its entirety in 2003, the Roberts Court began to whittle away at the law in its 2007 decision in *Wisconsin Right to Life*. That decision resulted in another \$100 million in corporate spending on TV electioneering ads in the last two months of the 2008 election.

Corporations have long shown a willingness to spend and contribute hundreds of millions of dollars each election through loopholes in the law. Now that the Court has invalidated restrictions on corporate political spending, expect a flood of new money into the 2010 congressional campaigns, state candidate campaigns, state judicial elections, and the 2012 presidential election.

### **Three Powerful Ways to Curb Excessive Corporate Spending in Elections**

Several options for reining in the damage caused by the Court in *Citizens United* are under consideration. Many of these legislative responses – such as prohibiting foreign nationals from funneling money into American elections through U.S. subsidiaries of foreign corporations, strengthening the anti-coordination rules to prevent corporations from hiring as campaign



consultants the same people hired by the candidates, and enhancing transparency requirements of corporate entities financing ads – will mitigate the expected corporate onslaught and are worthy of consideration.

Three other means for curbing excessive corporate political spending deserve special consideration by Congress. We discuss these options below.

### **1. Public Financing of Elections**

Public financing of elections is the single most effective legislative remedy for unlimited corporate spending. The public financing plans now under consideration have been designed specifically to overcome the barriers imposed by the courts on campaign finance laws, as well as to embrace the new small donor phenomenon seen in the 2008 election. The Fair Election Now Act creates a congressional public financing system with the following features:

- Qualified candidates are provided with ample public funding—more money than nearly all winning House or Senate candidates have raised from private sources—giving candidates the resources necessary to respond to attacks from corporate spenders.
- Participating candidates are not bound by contribution ceilings, which enables those who are the targets of excessive corporate spending to continue raising funds in small donations and to spend those funds without limit.
- In-state small donors who give \$100 or less to a candidate have their contributions matched four-fold with public dollars, making small donors very important players in financing campaigns.

The Fair Elections Now Act (S. 752 and H.R. 1826) was introduced in the Senate by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by Reps. John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.). The House bill has more than 130 cosponsors and should be passed now to provide congressional candidates with an alternative to corporate-funded elections in 2010.

It is critical that we modernize the presidential public financing system in advance of the 2012 presidential elections. Public financing is also key to addressing the corrosive influence of corporate spending in elections for local, judicial, and state candidates.

### **2. A Shareholder Protection Act and Other Legislative Remedies**

Corporate executives should not be able to use other people's money - corporate funds from investors and shareholders, including funds that people invest into retirement accounts - to further their own political agendas without shareholders' consent or even knowledge.

In 2000, the United Kingdom adopted a shareholder protection act that requires CEOs to receive shareholder approval for political contributions to parties or candidates.

We need shareholder protections for the United States that are tailored to the American context and made considerably stronger than the UK law. One such proposal (H.R. 4537) has been introduced in the House by Rep. Michael Capuano (D-Mass.). Specifically, the Shareholder Protection Act of 2010 would do the following:

- Require majority approval by shareholders for corporate political expenditures over \$10,000, including expenditures for campaign ads, electioneering communications, issue advocacy and ballot measure campaigns at the state and federal levels.
- Provide that brokers of other people's money cannot vote on behalf of their investors.

It is important that the language in the bill is clarified to establish clearly that it also requires mutual funds to receive consent from their own shareholders for any vote on a corporate political expenditure, and pension funds to obtain consent from beneficiaries. A critical weakness of the UK system is that it allows institutional investors to vote on behalf of shareholders. As a result, only one resolution for corporate political expenditures has ever been rejected by UK shareholders since inception of the shareholder protection law in 2000. An effective shareholder protection act for the United States, where corporations have shown a far greater willingness to spend to influence politics, must close this loophole.

- Create public records, available on the Internet, that fully inform shareholders and the general public of the specific candidates, parties, or issues subject to corporate political spending.

Public Citizen supports other legislative measures to mitigate the damage from *Citizens United*, as well, including proposals to prohibit government contractors, corporations receiving specific benefits from the government (e.g., TARP recipients) and lobbyists from making political expenditures.

### 3. A Constitutional Amendment

Corporations are not people. They do not vote, and they should not have power to influence election outcomes. We should end the debate about the freedom of speech of for-profit corporations by amending the Constitution to make clear that First Amendment rights belong to natural persons and the press and do not apply to for-profit corporations.

Public Citizen does not take amending the Constitution lightly. The proposition requires careful deliberation. But the Roberts Court 5 justice majority has interpreted the First Amendment in a way that does grave harm to our democracy, and the Court shows every sign of extending the damage further. A constitutional amendment is the only way to overcome with finality the profound challenges to our democracy posed by the *Citizens United* decision.

As a starting point for deliberating an appropriate constitutional remedy, Public Citizen is proposing the following language:

**Amendment XXVIII**

The freedoms of speech and the press, and the right to assemble peaceably and to petition the Government for the redress of grievances, as protected by this Constitution, shall not encompass the speech, association, or other activities of any corporation or other artificial entity created for business purposes, except for a corporation or entity whose business is the publication or broadcasting of news, commentary, literature, music, entertainment, artistic expression, scientific, historical, or academic works, or other forms of information, when such corporation or entity is engaged in that business. A corporation or other artificial entity created for business purposes includes a corporation or entity that, although not itself engaged in business pursuits, receives the majority of its funding from other corporations or artificial entities created for business purposes.

The proposed amendment would clarify that the First Amendment rights guaranteed to human beings do not apply to for-profit corporations and other entities primarily funded by for-profit corporations. Members of the media would retain full First Amendment rights when engaged in publishing, broadcasting, and similar activities. Like other for-profit corporations, however, media organizations would not have the right to sponsor campaign ads or make campaign contributions.

**Conclusion**

Congress must move swiftly and decisively to mitigate the damage to our democratic system of governance posed by the *Citizens United* decision. Unlimited corporate spending will give wealthy special interests an overwhelming advantage in affecting election outcomes, further reduce the role of citizens and small donors in the election process, and contribute to the alienation of citizens from their government. Just as damaging will be the impact a corporation can have on the legislative process, with lawmakers keenly aware that their decision to support or oppose legislation of particular interest to a given corporation or business association may seal the lawmaker's fate in the next election.

Several steps must be taken to respond to *Citizens United*. The most significant include a strong shareholder protection act, robust public financing of elections, and a constitutional amendment declaring that for-profit corporations are not entitled to First Amendment protections.

Sincerely,

Robert Weissman, President, Public Citizen

David Arkush, Director, Public Citizen's Congress Watch

Craig Holman, Government Affairs Lobbyist, Public Citizen



YOU STREET

**As Supreme Court Unleashes Corporate and Union Money in Campaigns,  
more than 50 Former Senators and Representatives Call for Sweeping  
Campaign Finance Overhaul**

*Group Calls on Congress to Stem Unlimited Corporate Money and Pass Court-Sanctioned 'Fair Elections' Public Funding Bill, Sponsored by 134 Members of Congress*

Co-Chairs

SENATORS

Bill Bradley  
Bob Kerrey  
Warren Rudman  
Al Simpson

WASHINGTON, DC - Former U.S. Senators Bill Bradley, Warren Rudman, Bob Kerrey, and Alan Simpson, co-chairs of the national nonpartisan group **Americans for Campaign Reform**, today released the following statements in response to the Supreme Court's landmark 5-4 ruling in *Citizens United v. FEC*. They are joined in their support of the Fair Elections Now Act (S 752 / HR 1826) by a group of well-respected Democratic and Republican former Members of Congress.

**Former Senator Bill Bradley (D-NJ)**

"For more than a century, reformers have sought to curb corporate influence in our government through commonsense limits on corporate spending in federal elections. Now the Supreme Court has reversed that precedent by asserting that corporations are free to spend unlimited sums of money to influence campaigns. The Court is not accountable to the people, but Congress ought to be. It's time Congress stood up for the rights of ordinary citizens by preventing unlimited corporate spending and passing the only long-term reform solution to influence-peddling in Washington: publicly-funded Fair Elections."

**Former Senator Warren Rudman (R-NH)**

"Today's Supreme Court ruling reinforces the overwhelming cynicism of the American people in their government. That cynicism is caused by the widespread feeling that Congress has been corrupted by special interest money. I know of only one way to fundamentally address this problem: a publicly-funded Fair Elections program that replaces big money in campaigns with broad-based small donations and matching public funds for qualifying candidates."

**Former Senator Bob Kerrey (D-NE)**

"The Supreme Court has shown that it is more concerned with protecting free speech "rights" of wealthy corporations than those of ordinary Americans in the political debate. But speech isn't free when only the rich can get heard. Congress must now work to expand political speech for the benefit of all citizens by replacing special interest money with publicly-funded elections."

**Former Senator Al Simpson (R-WY)**

"The current big money system is bad for taxpayers and bad for the economy, and it will only get worse if the Supreme Court's decision is not met with a swift response by Congress to curb corporate and union spending and pass Fair Elections. The amount of wasteful spending we see today through earmarks and pork barrel spending is an abomination. At \$1-\$2 billion a year, the price of citizen funded elections pales in comparison to the tens of billions in taxpayer money going to benefit big contributors."

**Former Members of Congress endorsing the Fair Elections Now Act:**

Sen. Jim Abourezk (D-SD)  
Rep. Don Albosta (D-MI)  
Rep. Lud Ashley (D-OH)  
Rep. Chet Atkins (D-MA)  
Rep. Michael Barnes (D-MD)  
Rep. Berkley Bedell (R-IA)  
Rep. Sherry Boehlert (R-NY)  
Rep. David Bonior (D-MI)  
Rep. Bill Burlison (D-MO)  
Rep. Jim Chapman (D-TX)  
Rep. Butler Derrick (D-SC)  
Rep. Vic Fazio (D-CA)  
Rep. Dan Glickman (D-KS)  
Rep. Frank Guarini (D-NJ)  
Rep. Lee Hamilton (D-IN)  
Rep. Micheal Harrington (D-MA)  
Rep. James Hastings (R-NY)  
Rep. Elizabeth Holtzman (D-NY)  
Rep. Amory Houghton (R-NY)  
Rep. Thomas Huckaby (D-LA)  
Rep. Bill Hudnut (R-IN)  
Rep. Earl Hutto (D-FL)  
Rep. Andy Jacobs (D-IN)  
Rep. John Jenrette (D-SC)  
Rep. Martha Keys (D-KS)  
Rep. Jim Leach (R-IA)  
Rep. Elliot Levitas (D-GA)  
Rep. Stan Lundine (D-NY)  
Rep. Richard Mallery (R-VT)  
Sen. Charles Mathias (R-MD)  
Rep. Pete McCloskey (R-CA)  
Rep. Matt McHugh (D-NY)  
Rep. Toby Moffet (D-CT)  
Rep. Connie Morella (R-MD)  
Rep. Lucien Nedzi (D-MI)  
Rep. Tom Osborne (R-NE)  
Rep. Leon Panetta (D-CA)  
Rep. Pettis-Roberson (R-CA)  
Rep. John Porter (R-IL)  
Rep. Tom Railsback (R-IL)  
Rep. Marty Russo (D-IL)  
Rep. Patricia Schroeder (D-CO)  
Rep. John J.H. Schwarz (R-MI)  
Rep. Ronnie Shows (D-MS)  
Rep. Charles Stenholm (D-TX)  
Rep. James Symington (D-MO)  
Rep. Estaban Torres (D-CA)  
Rep. J. Bob Traxler (D-MI)  
Sen. Timothy E. Wirth (D-CO)

**Testimony of Fred Wertheimer**

**President, Democracy 21**

**On the Supreme Court Decision in *Citizens United v. FEC***

**Submitted to the House Administration Committee**

**February 4, 2010**

## Executive Summary

The 5 to 4 Supreme Court decision in the *Citizens United* case declaring unconstitutional the ban on corporate expenditures in federal campaigns is the most radical and destructive campaign finance decision in the Court's history.

It is fair to say, as Justice Stevens does in his dissent, that this case was brought by the Justices themselves. It is also fair to say, as Justice Stevens does in his dissent, that "the only relevant thing that has changed" since the *Austin* (1990) and *McConnell* (2003) Supreme Court decisions upholding the corporate campaign spending ban "is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*...."

The dissent in *Citizens United* by Justice Stevens is a majority opinion-in-waiting. One day the *Citizens United* decision will be given the same kind of deference and respect by a new majority of the Court that the current Supreme Court majority gave to the *Austin* and *McConnell* decisions; that is to say, none.

The *Citizens United* decision represents an enormous transfer of power in our country from citizens to corporations. It opens the door to the use of the immense aggregate wealth of corporations to directly influence federal elections and, thereby, government decisions for the first time in more than a century.

Under this decision, insurance companies, banks, drug companies, energy companies and the like, and their trade associations, will *each* be free to run multimillion dollar campaigns to elect or defeat federal officeholders, depending on whether the officeholders voted right or wrong on issues of importance to the corporations and trade associations.

Members of Congress will have a sword of Damocles hanging over their heads. A "wrong" vote by a Member on an issue of great importance to major corporations or trade associations could trigger multimillion dollar campaigns by the corporations and trade associations to defeat the Member. And Members would be forced to consider this consequence repeatedly in deciding how to vote on legislation. Although not expressly addressed by the Court's opinion, under the Court's reasoning, labor unions also have been freed up to use their treasury funds for these purposes, although their resources are dwarfed by corporate resources.

Democracy 21 believes it is essential for Congress to move swiftly to enact legislation to mitigate the enormous damage done by the decision. The organizing principles for such legislation should be to advance legislation that directly responds to the impact of this decision, that can promptly pass the Senate and the House and that can be enacted in time to be effective for the 2010 congressional elections.

We believe Congress should focus on enacting the following provisions to respond directly to the *Citizens United* decision: new disclosure rules for corporations and labor unions; a provision to close the *Citizens United* created loophole for foreign interests to participate in federal elections through domestically-controlled corporations; provisions to make effective the existing Lowest Unit Rate requirements; meaningful and effective rules to define what constitutes coordination between outside spenders and candidates and political parties; and provisions to extend the existing government contractor pay-to-play restrictions.

Chairman Brady and Members of the Committee:

I am Fred Wertheimer, the president of Democracy 21 and I appreciate the opportunity to submit testimony on the impact of the Supreme Court's decision last month in *Citizens United v. Federal Election Commission*, and on the need for an immediate legislative response by Congress, within the confines of the decision, to limit the damage to our political system that will result from the decision.

Democracy 21 is a nonpartisan, nonprofit organization which supports the nation's campaign finance laws as essential to protect against corruption and the appearance of corruption in the political process and to provide for fair elections. I have worked on campaign finance issues and reforms since 1971.

The 5 to 4 Supreme Court decision in the *Citizens United* case declaring unconstitutional the ban on corporate expenditures in federal campaigns is the most radical and destructive campaign finance decision in the Court's history.

The *Citizens United* decision represents an enormous transfer of power in our country from citizens to corporations. It opens the door to the use of the immense aggregate wealth of corporations to directly influence federal elections and, thereby, government decisions for the first time in more than a century.

Democracy 21 believes it is essential for Congress to move swiftly to enact legislation to mitigate the enormous damage done by the decision. The organizing principles for such legislation should be to advance legislation that directly responds to the impact of this decision, that can promptly pass the Senate and the House and that can be enacted in time to be effective for the 2010 congressional elections.

The Supreme Court has long recognized the importance and constitutionality of the role played by campaign finance laws in preventing corruption and the appearance of corruption.

In the landmark *Buckley* decision, the Court stated about contribution limits:

Laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption *inherent in a system permitting unlimited financial contributions*, even when the identities and of the contributors and the amounts of their contributions are fully disclosed. (Emphasis added.)



The Court further stated in *Buckley*:

Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'

Democracy 21 supported the Bipartisan Campaign Reform Act of 2002 (BCRA), a portion of which dealing with corporate and labor union campaign expenditures was invalidated by the Court in the *Citizens United* opinion. The principal component of BCRA, the ban on soft money contributions to political parties, was not involved in the *Citizens United* case.

In order to reach the *Citizens United* decision, Justice Kennedy, Chief Justice Roberts and three of their colleagues abandoned longstanding judicial principles, judicial precedents and judicial restraint to decide an issue which had not been raised in the case. The issue was waived by Citizens United in the court below, was not brought to the Supreme Court by Citizens United on appeal, and could have been avoided by resolving the case on any one of a number of narrower grounds.

It is fair to say, as Justice Stevens does in his dissent, that this case was brought by the five Justices themselves.

It is also fair to say, as Justice Stevens does in his dissent, that "the only relevant thing that has changed" since the *Austin* (1990) and *McConnell* (2003) Supreme Court decisions upholding the corporate campaign spending ban "is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*...."

Disregarding all of the restraints that Justices – particularly so-called conservative Justices – usually appeal to in the name of judicial modesty and respect for precedent, the majority here engaged in breathtaking judicial activism to toss aside a settled national policy established more than 100 years ago to prevent the use of corporate wealth in federal elections.

The *Citizens United* decision is wrong for the country, wrong for the constitution and will not stand the test of time.

The dissent in *Citizens United* by Justice Stevens is a majority opinion-in-waiting.

One day the *Citizens United* decision will be given the same kind of deference and respect by a new majority of the Court that the current Supreme Court majority gave to the *Austin* and *McConnell* decisions; that is to say, none.

Until less than two weeks ago, the financing of federal elections in our country had been limited by law to individuals and groups of individuals, functioning through PACs. The citizens who have the right vote in our elections were also the only ones who had the right to finance the elections.

Prior to the *Citizens United* decision, corporations were prohibited from using their corporate wealth to influence federal campaigns, whether through contributions or expenditures, dating back to 1907 when Congress banned corporations from “directly or indirectly” making contributions in federal elections.

The changes made in the law in 1947 only affirmed that expenditures always had been covered by the 1907 law. I am enclosing for the record to accompany my testimony a memorandum prepared by Democracy 21 on the history of the 1907 and 1947 laws.

Under the *Citizens United* decision, the immense aggregate wealth of corporations has now been unleashed to influence federal elections and, thereby, government decisions. The *Fortune* 100 companies alone had combined revenues of \$13 trillion and profits of \$605 billion during the last election cycle. Although not expressly addressed by the Court’s opinion, under the Court’s reasoning, labor unions also have been freed up to use their treasury funds for these purposes, although their resources are dwarfed by corporate resources.

Corporations and labor union funds have been freed up to make these expenditures in, and have the same damaging impact on, state, local and judicial elections as well.

Former Senator Chuck Hagel (R-NE) understood the enormous stakes in the *Citizens United* case and the disastrous impact striking the corporate ban would have on how our government works. He was interviewed for an opinion piece in *The Washington Post* before the decision was issued:

Chuck Hagel, the Nebraska Republican who retired from the Senate last year after serving two terms, said in an interview that if restrictions on corporate money were lifted, “the lobbyists and operators . . . would run wild.” Reversing the law would magnify corporate power in society and “be an astounding blow against good government, responsible government,” Hagel said. “We would debase the system, so we would get to the point where we couldn’t govern ourselves.”

The *Citizens United* decision changes the character of our elections and governance.

Under this decision, insurance companies, banks, drug companies, energy companies and the like, and their trade associations, will *each* be free to run multimillion dollar campaigns to elect or defeat federal officeholders, depending on whether the officeholders voted right or wrong on issues of importance to the corporations and trade associations.

These campaigns, in addition to TV ad campaigns, can include direct mail campaigns, computerized phone bank campaigns and various other efforts, all urging voters to elect or defeat candidates. The TV ad campaigns, furthermore, are likely to often come in the form of negative attack ads, which often occurs with independent expenditures.

Members of Congress, in effect, will have a sword of Damocles hanging over their heads. Any “wrong” vote by a Member on an issue of great importance to major corporations or trade associations could trigger multimillion dollar campaigns to defeat the Member. And the Member would be forced to consider this consequence repeatedly in deciding how to vote on legislation.

Furthermore, once major corporations and trade associations used independent campaign expenditures to take out one or a couple of Members for voting wrong on a bill of importance to the spenders, just the threat of such expenditures could have the same effect of influencing the votes of other Members, without the spenders even having to make the expenditures.

As *The New York Times* (January 22, 2010) noted in discussing the impact of the *Citizens United* case, lobbyists have gotten a new “potent weapon” to use in influencing legislative decision making. The *Times* article stated:

The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.

“We have got a million we can spend advertising for you or against you – whichever one you want,” a lobbyist can tell lawmakers, said Lawrence M. Noble, a lawyer at Skadden Arps in Washington and former general counsel of the Federal Election Commission.

It would not take many examples of elections where multimillion corporate expenditures defeat a Member of Congress, before all Members quickly learn the lesson: vote against the corporate interest at stake in a piece of legislation and run the risk of being hit with a multimillion dollar corporate ad campaign to defeat you. The threat of this kind of retaliatory campaign spending, whether the threat is explicit or implicit, is likely in itself to exert an undue and corrupting influence on legislative decision-making.

While individuals have long had the right to run independent expenditure campaigns to elect or defeat federal candidates, opening the door to the nation’s corporations to conduct full-blown direct expenditure campaigns to elect and defeat candidates takes us into a whole new world. Large corporations have immense resources and the economic stakes they have in Washington decisions are enormous. These corporations have ongoing, continuous agendas in Washington they are trying to advance and they now have a huge new opportunity to use their resources directly in campaigns to buy influence to advance those agendas.

Some have said that they expect *Citizens United* to have a modest impact on the use of corporate funds to influence federal campaigns – either directly or through trade associations

Experience would argue otherwise.

Once it became clear that the soft money system was a way to use unlimited contributions to buy influence over government decisions, the soft money system grew rapidly.

Political party soft money tripled from 1992 to 1996 and then doubled again by 2000. By 2002 when the system was shut down, soft money had turned into a \$500 million national scandal, with business interests accounting for the great bulk of the contributions.

A recent report by Peter Stone and Bara Vaida in the *National Journal* illustrates the dangers that lie ahead. The article, entitled “Wild West on K Street,” states:

All across town, lobbyists and campaign consultants, media consultants, and pollsters discussed how and whether clients should take advantage of the January 21 Supreme Court decision, which ended a ban on direct spending by corporations and unions in political elections. Business groups, increasingly unhappy with President Obama’s agenda, are buzzing about the potential for unleashing multimillion-dollar ad drives in the last months of the 2010 elections, while unions are jittery about their ability to match corporate war chests.

According to the story, one Republican strategist “predicted the change would be huge. ‘That decision was like a cannon – the shot heard around the political world,’ he said, adding that the ruling will take Washington back to ‘the Wild, Wild West of spending money.’”

The *National Journal* report states that a Democratic campaign strategist “theorized that companies with fat profit margins might even look at ways to purchase Senate seats. ‘No question, if you are looking at a strategy about how you buy a Senate seat, where is the cheapest place to go? The rural states, where \$5 million can buy you a Senate seat and is nothing for a company like ExxonMobil.’”

Major corporations may, at least initially, be concerned about their public image and therefore may resist making these expenditures themselves. But under current rules, these corporations could keep their images intact by making large donations to and through third party groups, such as the Chamber of Commerce or other trade associations, and those intermediaries could make the expenditures without the source of the money being made public.

According to the *National Journal* report:

[Republican strategist John] Feehery and others on K Street are likely to advise their clients to direct their money to tax-exempt 501(c)(4) and 501(c)(6) trade groups, which will now be freer to spend member money to explicitly target ads in support or opposition of candidates. These organizations do not have to disclose their donors.

Established business groups, such as the U.S. Chamber of Commerce, which have become more strident about the direction that congressional Democrats and the Obama administration have taken energy, financial services, and health care reform in the past year, are seeing a big opportunity.

And where the economic stakes are high enough for corporations, sooner or later we can expect to see the expenditures being made by the corporations themselves.

Further, the *Citizens United* opinion itself is likely to encourage corporations to exercise their just discovered “free speech” rights by making expenditures to influence elections, even if they have not engaged in permissible non-express advocacy spending in the past. The fact that

corporations are now unconstrained in mounting full fledged campaigns against Members of Congress, and that corporate spenders no longer have to worry about the line between so-called “issue” discussion and express advocacy or its functional equivalent, is likely to encourage an increase in corporate electioneering spending.

Congress must respond quickly to the *Citizens United* decision, with legislative remedies that address the problems caused by the decision, within the constitutional confines of the decision, and that can be made effective for the 2010 congressional elections.

A number of possible reforms have been publicly discussed and various bills have already been introduced.

We believe Congress should focus on enacting the following provisions to respond directly to the *Citizens United* decision: new disclosure rules for corporations and labor unions; a provision to close the *Citizens United* created loophole for foreign interests to participate in federal elections through domestically-controlled corporations; provisions to make effective the existing Lowest Unit Rate requirements; meaningful and effective rules to define what constitutes coordination between outside spenders and candidates and political parties; and provisions to extend the existing government contractor pay-to-play restrictions.

#### **New Disclosure Rules for Corporations and Labor Unions**

A cornerstone of the legislation to respond directly to *Citizens United* should be new disclosure rules for campaign expenditures campaign expenditures and electioneering communications by corporations and unions. This should include providing the actual sources of the funding of these activities. It is important to require disclosure not only of direct spending by corporations and unions, but also the disclosure of transfers of funds that corporation and unions make to others to be used for campaign expenditures or electioneering communications.

The new disclosure regime should not be thwarted by the use of third party intermediaries to hide the actual sources of the funding.

While there have been strong differences over the years about limits and prohibitions on contributions and expenditures, there has been a general consensus in support of disclosure of campaign activities. This has not been a partisan issue in the past and it should not be a partisan issue today.

The Supreme Court, in *Citizens United* strongly affirmed by an 8 to 1 vote the constitutionality of requiring disclosure for express advocacy expenditures, the functional equivalent of express advocacy expenditures and electioneering communications. The latter are defined in the campaign finance laws as any broadcast ad that refers to a candidate and is run within 60 days of a general election and 30 days of a primary.

The Court stressed disclosure as an appropriate remedy: “With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”

New legislation should translate the Court's endorsement of prompt disclosure into new public disclosure rules. As the Court noted in *Citizens United* in upholding disclosure:

Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities,' *Buckley*, 424 U. S., at 64, and 'do not prevent anyone from speaking,' *McConnell*, *supra*, at 201.

The Court also explicitly reaffirmed its holding in *Buckley* that the governmental interest which supports the constitutionality of disclosure is the interest in "'provid[ing] the electorate with information' about the sources of election-related spending. 424 U. S., at 66."

The new disclosure rules should provide disclosure to the public, to corporate shareholders and to labor union members. It should include campaign expenditures and electioneering communications, the donors who actually fund those expenditures, transfer of funds to and through third-parties and new disclaimer requirements on campaign-related ads.

A recent article in *National Journal* (January 12, 2010) by Peter Stone illustrated what needs to be captured by new disclosure laws. According to the article:

Just as dealings with the Obama administration and congressional Democrats soured last summer, six of the nation's biggest health insurers began quietly pumping big money into third-party television ads aimed at killing or significantly modifying the major health reform bills moving through Congress.

That money, between \$10 million and \$20 million, came from Aetna, Cigna, Humana, Kaiser Foundation Health Plans, UnitedHealth Group and Wellpoint, according to two health care lobbyists familiar with the transactions. The companies are all members of the powerful trade group America's Health Insurance Plans.

The funds were solicited by AHIP and funneled to the U.S. Chamber of Commerce to help underwrite tens of millions of dollars of television ads by two business coalitions set up and subsidized by the chamber. Each insurer kicked in at least \$1 million and some gave multimillion-dollar donations.

The U.S. Chamber has spent approximately \$70 million to \$100 million on the advertising effort, according to lobbying sources. It's unclear whether the business lobby group went to AHIP with a request to help raise funds for its ad drives, or whether AHIP approached the chamber with an offer to hit up its member companies.

The article further stated:

Since last summer, the chamber has poured tens of millions of dollars into advertising by the two business coalitions that it helped assemble: the Campaign for Responsible Health Reform and Employers for a Healthy Economy.

Thus an industry trade association solicited huge donations from its corporate members which were then funneled through the Chamber of Commerce to two "business coalitions" with innocuous names that were established by the Chamber and that did the actual spending.

In order to be effective, new disclosure rules for independent expenditures and electioneering communications must capture, to use this example, the actual sources of the funding, the role of the Chamber as an intermediary or pass-through for the funds, and the contributions to and expenditures made by the organizations that buy the ads.

Another new disclosure provision that should be adopted is a stand by your ad requirement for express advocacy, the functional equivalent of express advocacy and electioneering communications ads run by corporations, labor unions and other organizations.

Just as candidates are required to appear in and take responsibility for their ads, the CEOs of corporations and the heads of other organizations should be required to appear in and take responsibility for their campaign-related ads.

#### **New Rules to Close the New Loophole for Campaign Expenditures by Foreign-Controlled Domestic Corporations**

The *Citizens United* decision creates a new loophole which will allow foreign interests to participate in federal elections through unlimited campaign expenditures made by domestic corporations that they control. I am enclosing for the record to accompany my testimony a memorandum prepared by Democracy 21 on the loophole opened by the *Citizens United* decision for foreign-controlled domestic corporations.

Although an existing statute, 2 U.S.C. § 441e, prohibits spending by foreign corporations to influence U.S. elections, it does not prohibit spending by domestic corporations owned or controlled by foreign nationals. An existing FEC regulation which purports to address this issue is ineffectual and will not prevent foreign interest involvement in such campaign spending. Furthermore, the regulation is “enforced” by a Federal Election Commission that is dysfunctional and has ceased to function as an enforcement agency.

The public needs effective statutory protection against foreign interests using domestic corporations to participate in federal elections. Providing this protection by statute, not just by FEC regulation, would also provide the Justice Department with a basis for enforcing the statute against any knowing and willful violators.

Congress should close the loophole opened by *Citizens United* by prohibiting foreign-controlled domestic corporations from making campaign expenditures and electioneering communications.

#### **Repair the Existing Lowest Unit Rate Requirement to make it Work**

Congress should repair the Lowest Unit Rate (LUR) rules to make them effective by providing candidates and parties with enhanced access to low cost and non-preemptible broadcast time. This would significantly increase the value of the funds raised by candidates and parties to spend on their campaign activities.

While the House has not passed such a provision in the past, the Senate in 2001 adopted an amendment to fix the LUR by a large bipartisan majority vote of 69 to 31. The proposal, however, did not become law.

Repairing the LUR would instantly increase the value of resources available to candidates and parties.

Democracy 21 is strongly opposed, however, to any efforts to increase the hard money limits for parties and candidates and thereby to increase the role of “influence-buying” contributions in our elections.

Any effort to undermine the party soft money ban, either by increasing the party contribution limits or by repealing the soft money ban, would take us back to a corrupt system in which large contributions to parties were used to buy influence over government decisions.

The soft money system was banned by Congress in 2002 with strong bipartisan votes in the House and Senate. The ban was signed into law by President George W. Bush and upheld as constitutional by the Supreme Court in the *McConnell* decision. The Supreme Court decision upholding the soft money ban in *McConnell* was not considered or affected by *Citizens United*.

Any effort to head back to the corrupt large contributions of the soft money system would be nothing less than having the “influence-buying” corruption unleashed by the *Citizens United* decision beget even more “influence-buying” corruption. This is a completely unacceptable response to the *Citizens United* decision.

#### **Coordination Rules**

The Supreme Court majority in *Citizens United* gave great weight to the idea that “independent” campaign expenditures by corporations could not be corrupting.

Yet, despite the fact that Congress in the Bipartisan Campaign Finance Reform Act of 2002 instructed the FEC to adopt new coordination regulations, eight years and four elections later, the FEC still has failed to adopt lawful coordination regulations to ensure that outside spenders do not coordinate with candidates and parties.

Democracy 21's legal team has been involved in litigation with the FEC over its failure to adopt lawful coordination regulations since 2003, representing former Representatives Christopher Shays and Marty Meehan.

The lawsuits have resulted in two federal district court decisions and two D.C. Circuit Court of Appeals decisions holding that the FEC coordination regulations are arbitrary, capricious, an abuse of discretion and contrary to law. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (“*Shays III Appeal*”) aff’g in part 508 F. Supp. 2d 10 (D.D.C. 2007) (“*Shays III District*”); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (“*Shays I Appeal*”) aff’g in part 337 F. Supp. 2d 28 (D.D.C. 2004) (“*Shays I District*”).



And incredible as it may be, eight years after the FEC was instructed by Congress to adopt new coordination regulations, we still do not have lawful coordination regulations that comply with court decisions. Instead, regulations found illegal by the courts remain in effect.

After the D.C. Circuit invalidated the FEC's coordination rules for a second time in 2008, the Commission waited 16 months to even begin a new rulemaking in response.

Based on this extraordinary performance, or more accurately, this extraordinary failure to perform, there is no reason to believe that the FEC is going to adopt legal and effective coordination rules in its current rulemaking. And, therefore, we now face a fifth election in a row without lawful coordination rules in effect.

The *Citizens United* decision has made it all the more clear just how important it is to have lawful and effective coordination regulations to ensure that independent expenditures are actually independent. If we are to achieve this goal it is clear that Congress will have to enact new coordination provisions and bypass the Federal Election Commission which has failed for eight years now to adopt such rules.

#### **Extend Government Contractor Pay to Play Rules**

Congress should consider pay-to-play rules to see if any new legislation is possible in this area. Any such legislation would have to fall within the boundaries of the decision in *Citizens United*.

One pay-to-play rule that already exists is a ban on federal contractors making contributions in federal campaigns. This ban should be extended to cover independent expenditures by contractors as well.

Federal contractors – such as defense contractors – have a direct contractual relationship with the federal government and a heightened and direct financial interest in government contracting decisions. The government has a compelling interest in ensuring that federal contractors, including corporations, do not use the power of their treasuries to buy favoritism in the federal contracting process.

Congress should adopt this focused pay-to-play rule.

Other areas that Congress may want to explore include requirements for shareholders to approve corporate campaign-related expenditures and union members to approve labor union campaign-related expenditures, and tax laws, which Justice Stevens in his dissent specifically referenced as an area that could be available for new rules.

In the longer term, it is essential for Congress to enact fundamental campaign finance reforms. These reforms include fixing the presidential public financing system, establishing a new system of public financing for congressional races and replacing the failed Federal Election Commission with a new, effective campaign finance enforcement body.

The Internet provides the opportunity to revolutionize the way we finance campaigns. By combining breakthroughs in Internet small donor fundraising with public matching funds, we can dramatically increase the role and importance of smaller donors in financing presidential and congressional races and provide major incentives for small donors to contribute.

The Supreme Court's ruling in *Citizens United* was a radical and unjustified assault by five Justices against a longstanding cornerstone of Congress's effort to safeguard the integrity of federal elections and government decisions against "influence buying" corruption and the appearance of such corruption. Congress should do everything in its power to enact appropriate safeguards that will minimize the enormous damage done by the Court's ruling.

### **Democracy 21 Memorandum:**

#### **National Policy Banning Use of Corporate Wealth in Federal Campaigns Established in 1907**

The question has been raised about whether the policy to ban corporate contributions and expenditures in federal elections dates back to 1947 or to 1907. It is clear from the history of the law that the policy to ban corporate expenditures originated in 1907.

In 1907, Congress enacted legislation to prohibit corporations from "directly or indirectly" making contributions in federal elections.

In 1947, Congress amended the statute to make clear that the "directly or indirectly" language in the 1907 statute had covered expenditures as well contributions.

The history shows why this is true.

In 1943, Congress extended the 1907 contribution ban on a temporary basis to cover labor unions as well as corporations. But the 1943 law was deemed ineffectual when reports surfaced that unions were circumventing the contribution restrictions in the 1944 elections by making expenditures to support their favored candidates. Thus, in 1947, Congress acted to reaffirm that the 1907 contribution ban had covered expenditures as well, and also to extend the ban to cover unions on a permanent basis.

Senator Robert Taft, the principal sponsor of the 1947 law, explained: "The previous law prohibited any contribution, direct or indirect, in connection with any election." He said that his legislation "only make[s] it clear that an expenditure...is the same as an indirect contribution, which, in [his] opinion, has always been unlawful." 93 CONG. REC. 6594 (1947) (statement of Sen. Taft)

A House Committee report at the time (H.R. REP. NO. 79-2739, at 40 (1946) stated that House Special Committee was "firmly convinced" that the "act prohibiting any corporation or labor organization from making any contribution" "was intended to prohibit such expenditures."

The Supreme Court recognized this point in the *CIO* case in 1948, when it said that the intent of the Taft-Hartley Act was not to "extend greatly the coverage" of existing law, but rather to restore the law to its original intent. 335 U.S. at 122.

Thus when Congress in 1907 decided to prevent the corrupting influence of direct or indirect corporate contributions in federal election by banning such contributions, it adopted a policy at that time to keep corporate wealth out of our elections, whether in the form of contributions or expenditures.

It was only because the 1907 prohibition was circumvented through direct expenditures in federal campaigns that Congress acted in 1947 to reaffirm and make clear that expenditures were included in the scope of the original 1907 ban.

#### **Democracy 21 Memorandum:**

### ***Citizen United* Decision Opens Loophole for Foreign Interests to Participate in Federal Elections through Domestic-Controlled Corporations**

In his State of the Union address, President Obama called on Congress to enact legislation to correct the problems caused by the Supreme Court's recent decision in *Citizens United v. FEC*. The President said that the decision "reversed a century of law to open the floodgates for special interests - including foreign corporations - to spend without limit in our elections."

The policy to ban corporations from using their corporate wealth to influence federal elections, whether by making contributions or expenditures, does date back to 1907.

According to press reports, Supreme Court Justice Samuel Alito, who was present at the State of the Union address, shook his head and mouthed "Not true" in response to the President's statement about spending by foreign corporations.

In contrast with Justice Alito's reported reaction, many others have expressed the same concern as the President - that the Court's action in striking down the longstanding ban on corporate expenditures has opened the door to foreign interests participating in federal campaigns.

Some have argued that this will not happen because there remains a separate federal law that prohibits contributions and expenditures to be made by any "foreign national" in connection with any Federal, State or local election. The Court in *Citizens United* did not review this separate law - section 441e - and it remains in effect.

Section 441e prohibits contributions or expenditures by any "foreign national" - which is defined to include any corporation "organized under the laws of or having its principal place of business in a foreign corporation."

Thus, a corporation organized in Germany, or with its headquarters in China, remains subject to a ban on spending in U.S. elections. But there are domestic corporations - those organized under state law in the United States - which are and can be controlled by foreign interests.

Those kinds of corporations - domestic corporations owned by or controlled by foreign governments, foreign corporations or foreign individuals - are not in any way prevented by section 441e from spending corporate treasury funds to influence U.S. elections.

Prior to the *Citizens United* decision, these corporations were prevented from spending their funds on expenditures to influence federal campaigns by the general prohibition on corporate campaign spending. But now that that prohibition has been struck down, these foreign-controlled domestic companies are free to spend their treasury funds directly to influence U.S. elections.

Thus, there is no statutory prohibition against foreign-controlled domestic corporations from making expenditures to influence federal elections, following the *Citizens United* decision.

The Federal Election Commission has a regulation in this area, but it is inadequate and does not provide effective protection for the public against foreign involvement in federal elections.

The FEC regulation prohibits any foreign national from directing, controlling or directly or indirectly participating in "the decision-making process" of any person, including a domestic corporation, with regard to that person's "election-related activities," including any decisions about making expenditures.

The regulation does not prevent foreign owners from making their views known to their American domestic subsidiaries about the governmental and political interests of the controlling foreign entity; it just prevents them from directly or indirectly participating in the formal "decision-making process."

Those who manage the domestic subsidiaries, furthermore, can be expected to know the governmental and political interests and needs of their foreign owners, and to be responsive to the needs of their owners, even absent any participation by the foreign owners in the formal "decision-making" process regarding expenditures in federal elections.

In other words, the existing FEC regulation is an inadequate and ineffective safeguard, by itself, to prevent foreign nationals from exerting influence on U.S. elections through the use of election-related expenditures made by domestic corporations which they own or control.

Thus, following the Supreme Court's invalidation of the ban on corporate expenditures, section 441e does not address at all the problem of expenditures made by domestic subsidiaries of foreign companies or domestic corporations controlled by foreign nationals, and there is no statutory prohibition on foreign nationals being directly involved in expenditure decisions made by foreign owned domestic corporations.

The only restriction here is an ineffective FEC regulation administered by an agency that is widely recognized as an abject failure in carrying out its responsibilities to enforce the nation's campaign finance laws.

Congress should move quickly to address this problem by enacting a statute to prevent foreign-owned or controlled domestic corporations from making expenditures in federal campaigns.



## **Restoring Public Confidence in the Integrity of Elections and Government in the Wake of the Supreme Court's Decision in *Citizens United***

**Testimony of Arn H. Pearson  
Vice President for Programs, Common Cause**

**Prepared for the House Administration Committee**

**February 9, 2010**

Chairman Schumer, Ranking Member Bennett, and distinguished members of the Committee, thank you for this opportunity to provide written testimony on urgent reform measures needed to restore public confidence in elections and the integrity of our democracy in the wake of last month's landmark *Citizens United* decision.

For almost 40 years, Common Cause has provided a nonpartisan voice for reforms that make government more open, honest and accountable to the American people. In the wake of the Watergate scandal, we led efforts to create the Federal Election Campaign Act in 1974, ushering in the system of campaign finance regulation and presidential public funding that federal candidates have run under for more than thirty years. Common Cause also played a key role in passage of the Bipartisan Campaign Reform Act to close soft money and electioneering loopholes. But skyrocketing campaign spending, constant legal attacks from the Right and creative lawyering by wealthy interests have left that system in dire need of an upgrade.

It comes as no surprise that the American people are experiencing a crisis in confidence in the ability of their elected government to act in the public's best interest. They voted overwhelmingly for reform and change in the past two national elections, but have only seen the grip of powerful interests tighten in Washington, spending well in excess of \$1 million per day to block badly needed health care, financial and energy reforms. A recent Wall Street Journal/NBC survey of voters found that 70% of voters think the government isn't working well, and 84% believe "the special interests have too much influence over legislation." Public confidence in Congress now hovers around historic lows. And a bipartisan poll commissioned by Common Cause, Public Campaign and Change Congress last week found that only 18% of voters believe Members of Congress listen more to voters than campaign funders.

Last month's decision from the U.S. Supreme Court in the *Citizens United* case will only make an already bad situation worse. The Court turned its back on 100 years of law and its own precedents to strike down federal prohibitions on independent political spending by corporations and unions, at the same time pulling the plug on similar laws in 24 states. That much we

expected. But the Court also declared outright – beyond overruling *Austin* and *McConnell* – that corporate expenditures *cannot* corrupt elected officials and that appearance of influence *will not* undermine public faith in our democracy. We at Common Cause were stunned by the sweeping nature of these proclamations, made without any factual record on those issues for the Court to review.

The effect of the decision is likely to let loose a flood of corporate and union independent spending in future elections, trigger a fundraising arms race by candidates fearful of that spending, and further reduce public trust in our democracy.

It's only been a few weeks since the *Citizens United* decision, and the big political players are already busy. According to the White House, 160 subsidiaries of foreign corporations – capable of spending hundreds of millions to influence the 2010 elections – have joined forces to block any efforts by Congress to close the foreign-owned corporations loophole created by the decision. Seasoned fundraisers report that party efforts to raise millions from corporations for “independent” expenditures are under way. And just one week before the decision, the U.S. Chamber of Commerce issued a press release threatening to spend an unprecedented amount of money in the 2010 elections to defeat Members of Congress who did not side with their agenda.

This Committee will no doubt hear a wide variety of legislative proposals to mitigate the impact of the *Citizens United* decision, and we encourage you to give them careful consideration. However, given this Court's narrow focus on *quid pro quo* corruption and its ideological approach to campaign finance law, there is very little you can do from a regulatory, limits-based approach to restore balance, let alone take meaningful steps to increase public confidence in Washington.

Common Cause supports a comprehensive package of reforms that both addresses the critical threat posed to our democracy's health by the *Citizens United* decision *and* the preexisting condition of undue influence and conflicts of interest caused by the current system's dependence on big money to pay for elections.

At a minimum, a post-*Citizens United* reform package needs to include:

1. ***The Fair Elections Now Act (S. 752 and H.R. 1826).*** While regulatory reforms are important, the American people will continue to lose faith in Congress unless you create a new system for 21st Century elections that empowers voters to take back control of their government. The Fair Elections Now Act allows candidates who agree to low contribution limits to run highly competitive campaigns focused on Main Street, instead of Wall Street, by providing matching funds for in-state small donations and allowing unlimited small-donor fundraising.
2. ***An upgrade for the presidential public funding system.*** The same voter-empowerment approach needs to be implemented for presidential elections. The

current system worked well for candidates of both parties for a generation, but its spending limits are outdated in both amount and timing. Presidential funding reform should provide more matching funds – but for small donors only – earlier in the cycle and larger general election grants, and allow participating candidates to engage in unlimited small-donor fundraising.

3. ***An airtight ban on political spending by foreign-owned domestic corporations.*** The *Citizens United* decision opens a loophole that allows foreign-owned corporations chartered in the United States to spend unlimited amounts of money to influence our elections. That loophole must be closed.
4. ***Real-time electronic disclosure of political expenditures to shareholders, and meaningful shareholder approval requirements.*** Corporations need to be accountable to their shareholders – and the public – for all direct and indirect political spending.
5. ***A prohibition on political expenditures by corporations that receive federal government contracts, earmarks, grants, tax breaks or subsidies.*** Corporations that profit from government contracts and largesse should not be in the business of influencing elections. To allow otherwise will lead to rampant conflicts of interest and further undermine public confidence in government spending and policy priorities.
6. ***Stronger coordination rules, to ensure that “independent” expenditures are truly independent.***
7. ***Stronger disclosure rules.*** Independent expenditures should be disclosed electronically within 24 hours in a manner accessible to candidates, the media and the public. CEOs should be required to “stand by their ads” just like candidates, and corporations that collect money for political expenditures should provide attribution for their top three donors, in order to prevent evasion of disclosure by “Astroturf” entities. FCC advertising logs should be made available on the Internet, and ads should include a web link to a site detailing where the money came from for the ad.
8. ***Pay-to-Play reforms.*** Congress should move quickly to dispel the public’s perception of special interest dominance in Washington by enacting low contribution and solicitation limits for lobbyists and lobbyist employers, strengthening conflict-of-interest rules, and banning earmarks for campaign contributors.

The best defense is a good offense. We urge you to seize this moment to lay the groundwork for a new generation of elections that raise up the voices of American voters and free elected officials from their dependence on wealthy special interests. If what we are witnessing is a return to the “Wild West” of American elections, then allowing candidates to run vigorous



campaigns on a blend of small contributions and limited public funds becomes an even more attractive alternative than it is now. In a world where there are no practical limits on political spending by organized wealthy interests, the Fair Elections Now Act offers a floor for competitive campaigns and matching funds to ensure that concentrated wealth cannot drown out the voices of Main Street.

The problem is not so much the amount we spend on political campaigns – columnist George Will likes to remind us that we spend more on potato chips than elections each year – as it is who pays for them, what they get in return, and how that distorts public policy and spending priorities. Keeping our elected officials dependent on the very same wealthy special interests they are supposed to regulate undermines public confidence in their government and its ability to tackle the tough issues that face the nation. And letting the interests who stand to gain from billions in federal spending and bailouts give politicians campaign cash undermines public faith in government’s ability to spend money wisely.

The issue of Fair Elections has never been more relevant, and never more urgent. Our new national poll, conducted by the bipartisan pair Greenberg Quinlan Rosner Research and McKinnon Media, found that **64% of voters oppose the *Citizens United* decision** (only 27% support it), and **3 out of 4 already think that special interests control Members of Congress**. Voters want **Fair Elections to be part of a response package by at 2-to-1 margin (62% to 31%)** – a result that holds across party lines – and are more likely to support candidates who support a reform package than those who oppose it.

These forces undermining public faith in their elected representatives do a profound disservice both to the people like you who go into public service and to the core institutions of American democracy. The problems facing America are daunting, yet by most estimates you have to spend more than a quarter of your time fundraising, often from those who have a direct financial stake in what you do. And it’s only going to get worse.

At first blush, the current campaign mess may look like a Gordian Knot. The cost of campaigns – and fundraising – is soaring, members face increasing pressure to fundraise for their own campaigns and their caucuses, and powerful interests with a financial stake in what you do are pouring record amounts into political contributions and sophisticated lobbying campaigns. But the words of Common Cause’s founder, John Gardner, ring as true today as they did in 1965 when he was sworn in as President Johnson’s Secretary of Health, Education and Welfare: “What we have before us are some breathtaking opportunities disguised as insoluble problems.”

The knot can be cut. Americans are hungry for change. Many members of Congress are hungry for change. The system you inherited – and the *fait accompli* just handed down by the Supreme Court – does not serve you well, nor does it serve the public well. People want government they can trust, and the power to give it to them lies within your grasp.

The Fair Elections Now Act offers a highly promising, effective and voluntary alternative to the current mess. Inspired by the success of reforms in states like Connecticut, Maine, Arizona, North Carolina and New Mexico, and tailored to avoid the ire of the new conservative majority on the U.S. Supreme Court, Fair Elections empowers candidates to run for Congress using a blend of small donor and public dollars, and to end their dependence on large contributions from special interests. Candidates who show significant support in their home states and agree to accept contributions of \$100 or less from individuals only can qualify for an initial campaign grant and earn a 4-to-1 match on in-state small donations.

This is not a partisan issue. In fact, HR 1826 has bi-partisan support with three Republicans joining the 130 House Democrats that have co-sponsored the bill. On Thursday, February 4, 2010 the House Fair Elections Now Act, championed by House Democratic Caucus Chairman John Larson (D-Conn.), reached more than half of the Democratic caucus as co-sponsors of the bill. Supporters include 66 percent of new members, 62 percent of Democratic women, and half of all Congressional Black Caucus members. This high level of support is a sign of the growing momentum for changing the way campaigns are financed in this country.

On the state legislators, there is also bi-partisan support for this type of reform. Hundreds of Democratic and Republican legislators, statewide officials and judges have been elected through similar systems at the state level over the past decade. Candidates who used state citizen-funded election programs now hold 85 percent of the seats in the Maine Legislature, 78 percent of the seats in the Connecticut General Assembly, 54 percent of the seats in the Arizona State Legislature, 80 percent of statewide elected offices in Arizona, and 68 percent of North Carolina's top judicial positions.

Citizen-funded elections work. I have worked closely with lawmakers from both parties over the last 12 years to implement and refine successful public funding programs in Maine and Connecticut, and to help design new systems for many other states and Congress. These are not one-size-fits-all laws; they are pragmatic programs tailored to the political realities of campaigns for different public offices and jurisdictions.

As a result, the laws enjoy strong bipartisan support from elected officials who believe they have significantly improved the political process for candidates and voters alike. Maine's elections commission surveys participating candidates after every election cycle, and those candidates consistently give the program high marks. As in years past, 95 percent said they were satisfied with the Clean Elections program in 2008, and 97 percent said they would likely or definitely use the program again for their next election. The most commonly cited reasons for this satisfaction were being able to focus on voters and issues, and not feeling obligated to others.<sup>1</sup> In Connecticut, 71 percent of participating candidates were satisfied with the Citizens' Election

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<sup>1</sup> Maine Commission on Governmental Ethics and Election Practices, *Report on Survey of 2008 Candidates*, forthcoming Aug. 6, 2009.

Program on its debut in 2008, and 66 percent believed the program reduced the perception that they were beholden to special interests.<sup>2</sup>

Voters like Fair Elections too. A recent poll in Maine shows that 74 percent of voters want gubernatorial candidates to use the program, and 55 percent said they would be more likely to support someone who did.<sup>3</sup> Likewise, our national polling in February of last year found 67 percent support for public funding for congressional candidates who agree to abide by lower contribution limits, and that support was remarkably consistent across party lines.<sup>4</sup>

Clearly we need to change the way America pays for elections. The current pay-to-play culture leads to an arms race in campaign spending and fundraising, undermines public confidence in their elected government, deters qualified people from entering public service, and makes it harder for you to do the job you came here for. *Citizens United* only amplifies these difficulties.

Fortunately, the small-donor/public-funding approach embraced by the Fair Elections Now Act is on solid constitutional ground. In fact, the more that the U.S. Supreme Court restricts what Congress can do to reform the system from a traditional regulatory standpoint – dramatically illustrated by their *Citizens United* decision – the more voluntary public funding systems offer the best avenue for meaningful change. In a world with fewer practical limits on political spending by organized wealthy interests, Fair Elections offers a floor for vigorous campaigns for all candidates to ensure that concentrated wealth cannot drown out other voices.

At an 80 percent participation rate, we estimate that the Fair Elections program would cost approximately \$500 million per year. That is a very small amount when compared to the cost of the new status quo, in which dependence on special-interest funding for campaigns will dramatically increase and the wealthiest actors in our society will spend unprecedented amounts to bend Congress and the White House to its will.

For the price of a cup of coffee per American per year, you can return common sense to the nation's capitol, put voters in the driver's seat for future elections, and leave a legacy for the next generation of voters and congressional candidates.

I urge you to include the Fair Elections Now Act in whatever *Citizens United* response package you enact.

Thank you for your consideration.

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<sup>2</sup> Connecticut State Elections Enforcement Commission, unpublished survey.

<sup>3</sup> Critical Insights, *Spring 2009 Tracking Survey*, June 2009.

<sup>4</sup> Lake Research Partners and the Tarrance Group, February 2009.

**GREENBERG QUINLAN ROSNER RESEARCH**

February 8, 2010

## Strong Campaign Finance Reform: Good Policy, Good Politics

**To:** Common Cause, Change Congress, Public Campaign Action Fund  
**From:** Stan Greenberg, Jesse Contario and Andrew Baumann, GQRR  
 Mark McKinnon, McKinnon Media

Ratings for everyone in Washington are low and voters are deeply pessimistic about the direction the country is heading. Driving those sentiments, according to a new national survey conducted for Common Cause, Change Congress and the Public Campaign Action Fund by Greenberg Quinlan Rosner in conjunction with McKinnon Media, is the belief that special interests are still running the show and that voters' voices are being drowned out by those who help fund politicians' campaigns.

This antipathy leaves voters staunchly opposed to anything that makes it easier for special interests to influence the outcome of elections, and by a two-to-one margin they oppose the recent Supreme Court decision on Citizens United. Voters crave solutions that will put power back in the hands of the people and respond intensely to proposals that would do so.

Voters, particularly independents, strongly embrace the Fair Elections Now Act, a system that allows candidates who eschew contributions over 100 dollars to receive public matching funds for money they raise from individuals in their own state. Voters support the Fair Elections Now Act by a two-to-one margin (62 to 31 percent). Perhaps more important for congressional incumbents, support for the Fair Elections Now Act offers a significant political boost. By a net of 15 points, voters say they are more likely to support the re-election of their Member of Congress (asked by name) if he or she votes in favor of a reform package that includes the Fair Elections Now Act as well as limits on spending by foreign corporations, even after hearing messaging in opposition to the proposal.

### Voters Angry About Influence of Special Interest, Especially Independents

Voters are disgusted with 'business as usual' in Washington. There is a deep and pervasive belief, particularly among independents, that special interests are running things and Members of Congress listen more to those that fund their campaigns than the voters that they are supposed to be representing. Three quarters believe that special interests hold too much influence over Washington today while fewer than a quarter believe that ordinary citizens can still influence what happens in politics. Similarly, nearly 80 percent say that Members of Congress are con-

Washington, DC

Seattle

London

Buenos Aires

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trolled by the groups that help fund their political campaigns while fewer than a fifth believe that Members listen more to the voters.

Moreover, voters do not believe that President Obama has fulfilled his promise to reduce the influence of special interests, with majorities saying both that special interests influence has increased since Obama took office and that the president has not done enough to reduce their influence. On all of these measures, regarding both Obama and Congress, independents are even more cynical and skeptical.

■ Table 1: Intense Cynicism over Influence of Special Interests Prevails, Especially Among Independents

	First Statement	Second Statement	First - Second Net
	<b>Total Independents</b>		
Limits should be placed on campaign spending CII	83	74	+9
Should not place limits on campaign spending CII	17	11	+6
Members of Congress are controlled by groups that fund their campaigns CII	72	62	+10
Members of Congress listen to regular voters CII	28	22	+6
Special interests have too much influence in Washington CII	74	64	+10
Ordinary citizens still have ability to influence politics in Wash- ington CII	21	19	+2
Obama has made effort to reduce influence of special interests CII	35	58	-23
Obama has not done enough to reduce influence of special in- terests CII	67	42	+25
Influence of special interests decreased since Obama took office CII	32	51	-19
Influence of special interests increased since Obama took office CII	68	49	+19

With voters so concerned about the influence of special interests, it is no surprise that they strongly oppose the recent Supreme Court decision in the *Citizens United v. Federal Election Commission* case. By a stark 64 to 27 percent margin, voters oppose this decision, with 47 percent strongly opposed. A majority of Democrats, Republicans and independents are opposed, but independents show the strongest antagonism, with 72 percent disagreeing with the ruling.

#### Broad Support for Reform Proposals, Including Fair Elections Now Act

Angry at Washington and deeply opposed to the recent Supreme Court ruling, voters strongly support proposals to limit corporate influence and develop a program that would allow politicians to run campaigns using small contributions from their constituents.

A majority of voters strongly favor both requiring corporations to get shareholder approval for political spending (56 percent strongly favor, 80 percent total favor) and a ban on political spending by foreign corporations (51 percent strongly favor, 60 percent total favor). A proposal similar to the Fair Elections Now Act also receives extremely high marks with 62 percent in favor versus just 32 percent opposed for a 30-point margin in favor – higher than the margin for the ban on political spending by foreign corporations.

When voters are read a short description of the Fair Elections Now Act, support holds strong at two-to-one in favor, with majority support from all segments of the political spectrum.

Table 2: Fair Elections Now Act Receives Majority Support Across Party Lines

	Support	Oppose	Net Difference
<b>Support for Fair Elections Now Act</b>			
Total	62	31	+31
Democrats	70	24	+46
Independents	67	30	+37
Republicans	50	40	+10

However, in an environment where voters are experiencing bailout and spending fatigue, a critique that the Fair Elections Now Act would represent nothing more than a 'bailout to help politicians pay for TV ads' does find some marginal traction – supported by 42 percent. Still, a 47 percent plurality reject that criticism and agree with a counter-argument that the Fair Elections Now Act is paid for without funding from taxpayers and is the best way to reduce wasteful pork spending. Moreover, even after hearing these criticisms, at the end of the survey, voters still overwhelmingly want to reward members who vote for the Fair Elections Now Act.

### Voters Say They Will Reward Backers of Bold Campaign Reforms

Congressional incumbents who take seriously voters' support for these proposals are likely to be rewarded in November at the ballot box; those who oppose these reforms do so at their own peril.

When presented with potential legislative actions that would help reduce the influence big corporations have on elections, voters strongly support reform. By two-to-one, voters believe that we must ban foreign corporations from spending money to influence our elections and that corporations should be required to get shareholder approval before spending money to influence campaigns, rather than believing that such bans would limit freedom of speech. When the pro-reform argument is made even more forceful by adding a call for a system that allows candidates to run for office without ever taking contributions over 100 dollars, support holds steady at 62 percent, despite the addition of stronger language from opponents that this approach would merely allow politicians to use taxpayer money to fund their campaigns.

## Strong Campaign Finance Reform: Good Policy, Good Politics

A majority of Democrats, independents and Republicans alike support both plans, but it is worth noting that independents are much more supportive of the more robust proposal that includes the Fair Elections Now Act (63 percent favor the stronger reform, compared to 56 percent who favor the more limited approach). Independents are even more disillusioned with the current state of things in Washington which makes them especially receptive to bold actions to rein in special interests.

Beyond being good policy in the eyes of the voters, supporting these plans also appears to be good politics for Members of Congress. Voters are more likely to support their Member for re-election if they support these campaign finance reform proposals and are less likely to reelect a Member who opposes reform.

Members who support the more robust proposal get an extra boost in support, particularly from independent and Democratic voters.

■ Table 3: Vote for Overarching Reform Translates Into Re-election Votes

	More Likely To Reelect	Less Likely to Reelect	More – Less Likely
<b>Impact of Vote for Limited Reform Proposal</b>			
Total	25	18	+10
Democrats	21	17	+4
Independents	31	17	+14
Republicans	25	14	+11
<b>Impact of Vote for Proposal Including Fair Elections Now Act</b>			
Total	28	13	+15
Democrats	31	10	+20
Independents	31	13	+18
Republicans	23	17	+7

This memo is based on a survey of 805 likely 2010 voters nationwide conducted February 2-4, 2010 by Greenberg Quinlan Rosner Research in conjunction with McKinnon Media. The margin of error is  $\pm 3.5$  percentage points at the 95 percent confidence interval.

# POLITICO

## SCOTUS ruling fuels voter ire

By: Jeanne Cummings  
February 9, 2010 04:43 AM EST

As if voters weren't mad enough at Washington, the Supreme Court apparently has given them one more reason to fume.

According to a bipartisan poll released Monday, voters oppose by a 2-to-1 ratio the court's ruling in *Federal Election Commission v. Citizens United* that cleared the way for corporations and unions to run political advertising.

The poll suggests that the ruling has reinforced voters' sense of disconnect with Washington and fueled the frustration that boiled to the surface in last year's tea party protests and in elections in New Jersey, Virginia and Massachusetts.

Asked if special interests have too much influence, 74 percent of respondents said yes. Asked if members of Congress are "controlled by" the groups and people who finance their political campaigns, a whopping 79 percent said yes.

Only 24 percent of the voters said ordinary citizens can still influence politicians, and just 18 percent agreed with the notion that lawmakers listen to voters more than to their financial backers.

Voters also issued a harsh assessment of President Barack Obama's promises to change Washington and limit the influence of special interests.

A majority — 51 percent — now believe the clout of corporations and other special interests has increased since he took office, while only 32 percent said their influence has decreased.

"There's no doubt about this. The last thing people want to see is corporations having a bigger role in elections," said Stan Greenberg, the Democratic polling expert who worked on the survey. The respondents' reactions were "knee jerk and with intensity."

The survey was commissioned by Common Cause, Change Congress and Public Campaign Action Fund to measure voter support for a bipartisan reform bill that would revamp the campaign finance system. That bill, the Fair Elections Now Act, would provide a 4-to-1 match of some donations of \$100 or less for candidates who don't seek or accept corporate checks. Qualifying candidates would also receive discounted television time and vouchers to cover a portion of their broadcasting budget.

While Democrats could face a backlash for failing to deliver on their promises of change, the survey has warnings for Republicans, too. They are positioning themselves to block passage of new regulations for the financial industry, which, according to a Wall Street Journal report, they hope will result in bigger donations from Wall Street in the midterm elections.

The party's traditional identification with Big Business could be dangerous, given the voters' discontent today and the new attention the court's ruling could bring to it.

"This has been an issue that's been off the radar screen," said Mark McKinnon, the Republican partner in the polling project. Now, "it is getting people's attention, including and especially among Republicans."

The five votes on the court that cleared the way for corporations and unions to run political advertising were all cast by justices appointed by Republicans, including two appointed by President George W. Bush. The decision was hailed by conservatives and many Republican congressional leaders. But according to the survey, about 51 percent of Republicans said they opposed the court decision, while 37 percent favored it. The ratio was even more lopsided among Republican voters who backed Republican candidates in 2008. Among those respondents, 56 percent oppose the ruling, and just 33 percent support it.



"It's important for Republicans to see this research and hear this message," said McKinnon.

Among all voters, 64 percent surveyed opposed the ruling, and 27 percent approved of it.

The survey found that voters supported the Fair Elections Now Act, 62 percent to 31 percent. Among independents, support rose to 67 percent. The poll also found that voters were more likely to support a candidate who backed such reforms.

Support is also strong for a variety of other proposals introduced since the court ruling was issued last month.

A whopping 80 percent of voters back a requirement that corporations receive approval from shareholders before spending money on political activities. About 60 percent back a proposal to ban foreign-owned corporations from spending money to influence elections.

Critics have warned that the ruling in the Citizens United case will lead to a flood of new television advertisements that could drown out the candidates' own messages and render the voters mute.

For evidence of the disproportionate power of corporations, McKinnon pointed to the "Defeat the Debt" advertisement that ran twice during the Super Bowl on Sunday night. A 30-second national ad during the game ran about \$2.5 million, according to CBS, which could have meant the bill for the ad was about equal to the amount spent in some of the most expensive House races in history.

The commercial was sponsored by the Employment Policies Institute, an organization run by Rick Berman, a lobbyist and Republican strategist who has conducted a host of advocacy campaigns backed by big corporate interests. But Berman bought time only in the Washington market, not nationally, so his bill amounted to only a little more than \$100,000, said Sarah Longwell, a spokeswoman for the anti-debt group.

Still, the potential for millions in corporate advertising now exists, McKinnon said, and the result could be the fulfillment of the voters' worries expressed in the campaign finance survey.

"If you want to buy yourself a senator from a small state with cheap media markets, you can," he said.

# San Francisco Chronicle

January 22, 2010

## Justices Strike Down Campaign Finance Laws Money talks, high court rules

Five robed radicals on the Supreme Court have pushed money-infused politics in the wrong direction by overturning a century's worth of campaign spending laws. Voters should prepare for the worst: cash-drenched elections presided over by free-spending corporations.

The ruling was dreaded for months as defenders of campaign finance laws tried to guess how far the court would go in paring back campaign financing rules. A string of prior laws dating back to the robber-baron era suggested the court would limit its reach.

No such luck. The 5-to-4 case swept away the underlying arguments for many of these laws. The upshot is that corporations and labor unions can spend freely on independent ads targeting or supporting candidates.

The majority's thinking is based on absolutist vision of free speech and belief that corporations and unions have the same constitutional protections as individuals when it comes to basic rights.

This viewpoint is "a rejection of the common sense of the American people," said Justice John Paul Stevens, who read his angry dissent out loud. Corporations "are not themselves members of 'We the People,' by whom and for whom our Constitution was established."

It's hard to overstate the legal sweep of the decision. It rejects two recent court rulings, one that barred corporations and unions from dipping into their treasuries to pay for candidate ads and the second that restricted these so-called independent expenditure efforts. The five-member majority didn't just blaze new ground; it torched the court's own past record.

In practical terms, the decision amounts to a political earthquake. Big-money issues such as health care, cap-and-trade pollution controls and Wall Street regulations will drive attack ads against politicians who refuse to do the bidding of particular special interests.

There's a chance to undo the damage. The coming tidal wave of spending may push Washington to reform the process. One goal should be a system of public financing for federal elections, and one such plan, the Fair Elections Now Act, is before Congress.

The proposal, similar to systems used in several states, would provide public funding for candidates who demonstrate widespread support and agree to spending limits. It would be voluntary, in keeping with court rulings, but should have a cleansing effect.

This country's politics, already tainted by heavy spending, can't allow a court decision that invites even more cash - and a corrosion of the democratic process.

January 21, 2010

The Honorable Harry Reid  
522 Hart Senate Office Building  
Washington, DC 20515

Re: Citizens United and the Fair Elections Now Act (H.R. 1826 & S. 752)

Dear Majority Leader Reid:

We write to you at an extremely troubling moment in the history of our democracy. The recent Supreme Court decision in *Citizens United v. Federal Election Commission* has opened the door to increased election spending by the deepest pocketed political interests in American politics. The corrosive influence of special interest money already impairs our government's ability to address our nation's most critical problems. We cannot continue down this path.

As business leaders, we believe the current political fundraising system is already broken. The Supreme Court decision further exacerbates this problem. Members of Congress already spend too much time raising money from large contributors. And often, many of us individually are on the receiving end of solicitation phone calls from members of Congress. With additional money flowing into the system due to the Court's decision, the fundraising pressure on members of Congress will only increase.

Congress needs to spend its time working on the leading issues of the day, from reviving our economy to addressing our nation's energy crisis to reforming the healthcare system. And on those issues, Americans must have full confidence that Congress has acted in the best interests of the public, swayed by the merits of policy without regard to the interests of campaign contributors.

We believe Congress must address both the *Citizens United* decision and the problems of the current campaign finance system by passing the Fair Elections Now Act (S. 752 and H.R. 1826). This measure would enact a voluntary alternative system for financing federal elections, giving candidates the option to run for office on a mixture of small contributions and limited public funds.

Under the leadership of Assistant Majority Leader Richard Durbin (D-Ill.) and House Democratic Caucus Chairman John Larson (D-Conn.), the bill is moving forward. We have significant momentum in the House, with 128 cosponsors joining Representative Larson. With a strong public financing system in place, candidates will be not be consigned to a system in which constant fundraising creates conflicts of interest and leaves Members little time to do the job they were elected to do.

We hope in the wake of the Supreme Court's decision you will support the Fair Elections Now Act so that Congress can act effectively on the people's business.

Signed,

**Berkley Bedell**  
Founder & Former President  
Pure Fishing

**Peter A. Benoliel**  
Chairman Emeritus  
Quaker Chemical Corporation

**Edgar M. Bronfman, Sr.**  
Former President and CEO  
Seagram's, Ltd.

**Allan Brown**  
Chairman of the Board  
Vance Brown Builders

**Richard M. Burnes, Jr.**  
Founder and General Partner  
Charles River Ventures

**Frank Butler**  
President (Ret.)  
Eastman Gelatine Corp.

**Ben Carlisle**  
President  
Allegiant Partners Inc.

**Ben Cohen**  
Founder  
Ben & Jerry's

**Charles Couric**  
Founder & Past President  
Brita Products Company

**Richard Foos**  
President  
Shout! Factory

**Walt Freese**  
CEO  
Ben & Jerry's

**Murray Galinson**  
Former Chairman (Ret.)  
San Diego National Bank

**Gerald Grinstein**  
Strategic Director  
Madrona Venture Group  
Former CEO of Delta Airlines

**Mike Hannigan**  
President  
Give Something Back

**Alan G. Hassenfeld**  
Chairman of the Executive Committee  
Hasbro, Inc.

**Christie Hefner**  
Former Chairwoman & Chief Executive  
Playboy Enterprises

**Arnold Hiatt**  
Former Chief Executive Officer  
Stride Rite, Inc.  
Chairman  
Stride Rite Foundation

**William N. Hubbard III**  
President  
Center Development Corporation

**Frederick S. Hubbell**  
Chairman (Ret.), Insurance and Asset  
Management Americas  
ING Group

**G. David Hurd**  
Emeritus Chairman  
Principal Financial Group

**Michael J. Johnston**  
Executive Vice President (ret.)  
Capital Group Companies

**Mike Kappus**  
President  
The Rosebud Agency

**Harry P. Kamen**  
Chairman & CEO (Ret.)  
MetLife

**Joe Keefe**  
President & CEO  
Pax World Management Corp.

**Earle W. Kazis**  
President  
Earle W. Kazis Associates, Inc.

**Steve Kirsch**  
Founder, Chairman and Chief Executive Officer  
Propel Accelerator  
Chief Executive Officer  
Abaca Technology Corporation  
Chairman  
Kirsch Foundation

**Alan E. Kligerman**  
Chief Executive Officer  
AkPharma Inc.

**Thomas Layton**  
CEO  
Metaweb Technologies

**Mark Lichty**  
President & CEO (Ret.)  
Bustin Industrial Products

**Vernon R. Loucks**  
Former CEO  
Baxter International Inc.

**Arnold Miller**  
Co-Founder  
Isaacson Miller

**Alan Patricof**  
Managing Partner  
Greycroft, LLC

**William Ruckelshaus**  
Strategic Director  
Madrona Venture Group

**Vincent J. Ryan**  
Chairman  
Schooner Capital

**Paul Sack**  
Principal  
Sack Properties

**Gordon Segal**  
Chairman  
Crate & Barrel

**Dick Senn**  
Founder & CEO  
Tanamar, Inc.

**Robert Sibarium**  
President  
Midnite Enterprises LLC

**Timothy Smith**  
Senior Vice President  
Environment, Social and Governance Group  
Walden Asset Management

**Philippe Villers**  
President  
GrainPro Inc.

**George Zimmer**  
President & CEO  
Men's Wearhouse

*Corporate Affiliations for Identification Purposes Only*

CC: Senate Minority Leader Mitch McConnell  
Senator Charles Schumer, Chairman, Committee on Rules & Administration  
Senator Bob Bennett, Ranking Member, Committee on Rules & Administration  
Assistant Majority Leader Richard Durbin

As of February 3, 2010

The Honorable Harry Reid  
522 Hart Senate Office Building  
Washington, DC 20510

Re: *Citizens United* and the Fair Elections Now Act (H.R. 1826 & S. 752)

Dear Senator Reid:

As religious leaders, we believe in equality and justice for all people and in building the common good. In a democracy, these ideals cannot be realized, however, if the rules governing the electoral process actively or passively favor one segment of the population over another.

We believe existing campaign finance laws already permit the unfair influence of persons and groups with extraordinary wealth over the political process by providing them with special access to elected officials. This special access ultimately results in legislative outcomes that reflect the needs of those with the financial means to make political contributions, and not the needs of the poor or disenfranchised.

The recent Supreme Court decision in *Citizens United v. Federal Election Commission* will surely amplify the voices of the wealthy campaign donors and bring new powerful players to fore at the expense of everyone else.

We believe Congress must address both the *Citizens United* decision and the problems of the current campaign finance system by passing the Fair Elections Now Act (S. 752 and H.R. 1826). This measure would empower average people to participate in politics with small donations, and would return the gaze of our elected officials solely to the needs of their districts and the nation as a whole, rather than the interests of those with significant financial resources for campaigns.

We pledge our support and we pledge to work among members of our churches, synagogues, mosques, gurdwaras (a Sikh place of worship) and temples throughout the nation to encourage support for your efforts to bring about reform. As you know, the Fair Elections Now Act was sponsored by Assistant Majority Leader Richard Durbin (D-Ill.) in the Senate and House Democratic Caucus Chairman John Larson (D-Conn.) and Congressman Walter Jones (R-N.C.) in the House. In the House, the legislation has attracted nearly 130 cosponsors. With a strong Fair Elections system in place, candidates will spend less time courting the narrow slice of Americans who currently fund campaigns and engage a larger, more active citizenry.

We hope in the wake of the Supreme Court's decision you will support the Fair Elections Now Act so that Congress can act effectively on the people's business.

**Signed,**

**The Rev. Dr. Michael Kinnamon, PhD, General Secretary  
National Council of the Churches of Christ in the USA  
New York, NY**

**Bishop Gabino Zavala, Bishop President  
Pax Christi USA: National Catholic Peace Movement  
Los Angeles, CA**

**Archbishop Vicken Aykazian  
Archbishop of the Washington Area  
Recent Past President of the National Council of Churches (2008-2009)  
The Armenian Apostolic Church  
Washington, DC**

**Dr. Sayyid M. Syeed, National Director  
Office for Interfaith & Community Alliances  
Islamic Society of North America  
Washington, DC**

**Rabbi Michael Lerner  
Editor, Tikkun  
Rabbi, Beyt Tikkun Synagogue,  
Chair, The Network of Spiritual Progressives  
San Francisco, CA**

**Jim Winkler, General Secretary  
United Methodist General Board of Church & Society  
Washington, DC**

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**(\*\*) For identification purposes only.**

January 26, 2010

The Honorable Harry Reid  
522 Hart Senate Office Building  
Washington, DC 20515

Re: Citizens United and the Fair Elections Now Act (H.R. 1826 & S. 752)

Dear Majority Leader Reid:

Like you, we are deeply concerned by the U.S. Supreme Court decision in *Citizens United vs. Federal Election Commission*. The Roberts Court has changed the landscape of political campaigns, given the new potential corporations have to raise exorbitant amounts of money for independent expenditures.

At this critical point, we urge you to find a solution to help candidates combat the expected increase in spending on independent expenditures. As supporters of the Fair Elections Now Act (H.R. 1826, S. 752), we encourage you to include this policy as part of any legislation considered in the coming days, weeks, or months in the wake of the *Citizens United* decision.

The Fair Elections Now Act addresses the fundamental problems of the current system — that elected officials and candidates spend too much time fundraising, and too much of the money raised is from large donors or special interests. This bill would enact public financing of federal elections and give candidates the option to run for office on a mixture of small contributions and limited public funds. Fair Elections puts a premium on grassroots fundraising, and enables candidates to run highly competitive campaigns without relying on large contributions.

Under the leadership of House Democratic Caucus Chairman John Larson (D-Conn.), there is significant momentum in the House, with 128 cosponsors, who have joined Rep. Larson in support of enacting the Fair Elections Now Act. In the Senate, Senate Assistant Majority Leader Dick Durbin, is joined by five additional Senators on the bill. With a strong, voluntary public financing system in place, candidates will be not be consigned to a system that is already broken, in which constant fundraising creates conflicts of interest and leaves Members little time to do the job they were elected to do.

Congress is already under fire for taking money from the very industries it regulates, like health care, energy and financial services. Voters are concerned about this problem: A bi-partisan poll from Lake Research/Tarrance Group released last year found that 79 percent of Americans are worried that Congress will be unable to tackle these important issues because of its dependence on large contributions. The Fair Elections Now Act can restore the public's faith in Congress' ability to act in the public interest.

You should seize the opportunity provided by the *Citizens United* decision to advance solutions to address the comprehensive problem of money in politics. Only policies like Fair Elections will reduce voter concerns about the influence of campaign donors, just as Congress did with post-Watergate reforms a generation ago. The path forward lies with small-donor democracy, not increased corporate dominance in Washington.

In closing, we encourage you to use your leadership role to push forward the Fair Elections Now Act as the part of the solution to address the potential problems created in the wake of the *Citizens United* decision. The time is now to strengthen voter participation in our democracy through a small-donor based public funding system. As representatives of organizations that advocate for citizens nationwide, we look forward to working with you on this measure.

Sincerely,

Gillian Caldwell  
Campaign Director  
1Sky

Linda Meric  
Executive Director  
9to5

Roger Hickey & Robert Borosage  
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Heather Smith  
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Rock the Vote

Jeff Blum  
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CC: Senator Charles Schumer, Chairman, Committee on Rules & Administration  
Assistant Majority Leader Richard Durbin



October 29, 2009

**Corporate Democracy:  
Potential fallout from a Supreme Court decision on *Citizens United***

The impending Supreme Court decision in *Citizens United v. Federal Election Commission*, which could be announced as early as Tuesday, Nov. 3, is expected to significantly expand the role of the most powerful special interests in financing American elections. The Court appears poised to turn its back on more than 100 years of law and pave the way for corporations and unions to spend unlimited amounts of money on direct campaigns to elect or defeat federal candidates.

Such a dramatic decision would further reduce trust in government policymaking and take our country in the wrong direction. It is hard to imagine how America can achieve real progress and tackle critical challenges – like health care, climate change and the economy – when our elected representatives are locked in an all-out fundraising arms race that makes them both more dependent on and vulnerable to the powerful special interests opposed to change.

Lifting the ban on corporate political spending could unleash a flood of money into the political system and further diminish the public's voice. Precisely how much money is hard to say, but consider the following:

- **Last year's Congressional and Presidential election was the most expensive in history, with total political and issue advertising exceeding \$3 billion nationwide. Corporations and unions could more than double this amount – every election – if they put as much into political ads as they already spend lobbying Congress, \$6 billion in the last election cycle.**
- **The health and insurance industries alone spent more than \$1.6 billion lobbying Congress during the 2008 election cycle, nearly double the \$861 million that all winning congressional candidates (435 House candidates and 35 Senate candidates) spent on their campaigns during the same period.**
- **PhRMA recently launched a \$150 million advertising campaign to support Senator Baucus' health care plan (without a public insurance option) – more than the \$140 million spent by all 55 winners of hot congressional races in 2008 combined. That's one trade association on one bill.**

- **In the 2008 elections, winning candidates for the House of Representatives spent an average of \$1.4 million – roughly equivalent to what the health care industries are spending per day so far this year to lobby Congress on health care reform.**
- **If the Supreme Court lifts the ban on using corporate profits for political spending, corporations would likely spend vastly more than labor unions. During the 2008 election cycle, corporations outspent organized labor 4:1 on political action committee (PAC) contributions, but 61:1 on lobbying.**

Opening up another avenue for unlimited private money to flow into the political system will almost certainly increase the overall amount spent each election. This, in turn, will further fuel the “arms race” that already forces our elected officials to engage in perpetual fundraising.

One of the only solutions to this deterioration of our democratic process is contained in legislation currently under consideration in Congress. The Fair Elections Now Act (H.R. 1826/S. 752) would allow candidates to run competitive campaigns using a combination of small contributions and limited public funds, instead of relying on large contributions from powerful special interests and bundlers.

### **Legal Background**

*Citizens United vs. Federal Election Commission* originally concerned whether a movie produced by the nonprofit group Citizens United, entitled “Hillary: A Movie,” qualified as a campaign ad and was subject to disclosure requirements. Instead, the Supreme Court decided to reopen the larger issue of whether corporations and unions should be allowed to spend unlimited amounts of treasury money on advertisements and other campaign activities that expressly endorse or attack a political candidate.

Corporations and unions have been prohibited from spending money from their general funds on this kind of advocacy at the federal level since 1947, when Congress passed the Taft-Hartley Act. The Supreme Court later upheld the constitutionality of this ban in 1957 in *U.S. v. United Automobile Workers*.

If the Supreme Court rules that the ban on direct corporate and union political advocacy is unconstitutional on First Amendment grounds – that corporations and unions have the same First Amendment rights as individuals – the Court could ultimately use the same reasoning to also overturn the ban on donations from corporate and union general funds directly to candidates, which was outlawed in 1907 by the Tillman Act.

Prohibiting corporations and unions from using treasury money to influence federal elections has been upheld repeatedly by the Supreme Court in *FEC v. National Right to Work Committee* (1982), *Austin v. Michigan State Chamber of Commerce* (1990), and most recently in *McConnell v. FEC* (2003) after the passage of the Bipartisan Campaign Reform Act (BCRA). In *McConnell*, the Court noted that, “Congress’ power to prohibit corporations and unions from

using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.”

The Court has repeatedly upheld these regulations in order to ensure that the special economic status corporations enjoy under the law is not used to dominate the political arena. In *Austin*, Justice Marshall recognized the state’s compelling interest in avoiding a “different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

Corporations and unions already spend hundreds of millions per cycle through PACs and 527s to influence federal elections. Allowing corporations to directly tap their enormous profits for unlimited political spending will hasten the nation’s descent into a new era of “corporate democracy,” where entities whose sole purpose is to maximize profits are given free rein to dominate elections and drown out the voices of ordinary Americans.

#### **Political Spending: Corporations vs. Candidates**

Corporations already spend huge sums every year to influence the outcome of public policy. While the current system bars direct corporate and union political spending, those entities are still able to wield considerable electoral influence through PACs, 527s, bundling and executive giving. If the Supreme Court strikes down the ban on direct political advocacy by corporations, it would create yet another opening for corporate money to flow into the political system. Under this scenario, companies could effectively run full-blown political campaigns – including television commercials, phone banks, and neighborhood canvassing – that would mirror the official campaigns of the candidates.

When it comes to lobbying – where corporations and unions can tap their treasuries without restriction – corporations and unions spend more in any given election cycle than candidates spend on their own campaigns. During the 2008 election, all candidates for Congress spent a total of \$1.4 billion on their campaigns, or roughly 26 percent of the \$5.2 billion corporations spent on lobbying during the same two year period. For the last five elections, candidate spending has been on average about 29 percent of total corporate lobbying during the same period.

**Total Corporate Lobbying vs. Total Candidate Spending**

Cycle	Corporate Lobbying	Campaign Spending	%
2008	\$5,170,752,703	\$1,366,384,657	26%
2006	\$5,002,604,155	\$1,411,998,213	28%
2004	\$4,164,795,807	\$1,135,090,248	27%
2002	\$3,410,549,971	\$930,186,153	27%
2000	\$2,981,481,715	\$1,010,902,673	34%
<b>Totals</b>	<b>\$20,730,184,351</b>	<b>\$6,324,802,014</b>	<b>29%</b>

Source: Center for Responsive Politics ([www.opensecrets.org](http://www.opensecrets.org))

In theory, if corporations spent about one-third of what they currently spend on lobbying during a two-year election cycle on direct political advocacy, they could outspend all Congressional candidates combined. In practice, corporations could target a discrete number of competitive races in order to give a majority in Congress to a particular party or ensure outcomes on critical legislation.

For example, in the 2008 elections the average winning candidate for the House of Representatives spent \$1.4 million on his or her campaign, and the average winning candidate for the Senate spent \$8.5 million. While total campaign spending does not automatically determine the winner in Congressional races, there is a strong correlation between levels of campaign spending (up to a certain amount) and election results.

In the upcoming 2010 elections, there are 13 seats in the U.S. Senate that are currently considered competitive by the Cook Political Report, six seats held by Republicans and seven held by Democrats. In the House, the Cook Report identifies 47 competitive races for 33 Democratic-held seats and 14 Republican-held seats. Using 2008 spending numbers, the winning candidates in those 60 races could be expected to spend a combined total of approximately \$175 million.

When just one trade association, like PhRMA, can put \$150 million into a targeted advertising campaign for one bill, it doesn't take much to imagine a future election in which corporate spending exceeds candidate spending.

**Political Spending: Corporations v. Organized Labor**

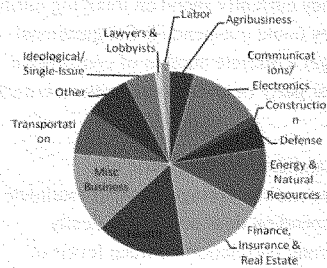
A Supreme Court holding in *Citizens United* that it is unconstitutional to limit corporate and union political spending would, in all likelihood, lead to a much greater spending gap between corporations and labor. Most of this spending currently takes place through PACs, which have strict limits on how much they can raise and spend. PACs may receive up to \$5,000 from any one individual and can give up to \$5,000 to a candidate per election (primary, general or special). In the last election cycle, corporations outspent unions 4 to 1 when it came to PAC spending. All



corporate PACs spent approximately \$270 million during the 2008 elections, while all organized labor PACs spent \$66.4 million during the same period.

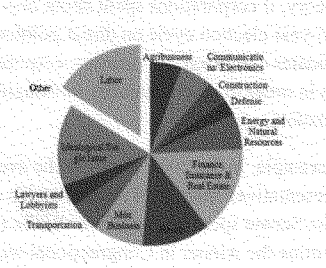
The disparity between corporate and union spending is much more dramatic when it comes to lobbying Congress, where there are no limits on treasury funds. During the 2008 election cycle, corporations spent a total of \$5.2 billion dollars lobbying Congress, or 61 times as much as labor unions, which spent \$84.4 million during the same period.

**Lobbying Spending by Economic Sector  
2008 Election Cycle**



Source: Center for Responsive Politics ([www.opensecrets.org](http://www.opensecrets.org))

**PAC Spending by Economic Sector  
2008 Election Cycle**



Source: Center for Responsive Politics ([www.opensecrets.org](http://www.opensecrets.org))

### Case Study: Independent Expenditures in California

Supporters of unlimited corporate and union political spending argue that many states already allow this type of advocacy, and that it has not caused a flood of private money into the political process. While that may be true in some states, California's experience has not been encouraging.

In California, which does not limit corporate and union political spending, independent expenditures exploded after voters adopted campaign contribution limits in 2000. According to the California Fair Practices Commission, independent spending on state legislative races soared from \$376,000 in 2000 to \$23.5 million in 2006. For statewide races, independent spending in California increased from \$526,000 in 2002, when there were still no contribution limits, to \$29.5 million in 2006 — 41 percent of candidate spending for that election, according to data from the National Institute for Money in State Politics.

In many cases, corporations or individuals spent large sums supporting or opposing individual candidates far in excess of contribution limits. In a particularly dramatic example, Intuit spent \$1 million to influence the state comptroller race. Intuit, which produces “Turbo Tax,” opposed the creation of a free on-line tax preparation program for California residents known as Ready Return. The company spent \$1 million in support of Republican Tony Strickland against Democrat John Chiang, who supported the Ready Return program. Although Strickland lost the race, Intuit’s expenditure helped fill the gap in fundraising between the two candidates, as Chiang had raised approximately \$3 million for his campaign and Strickland had raised only \$2 million.

Some wealthy individuals have also used independent expenditures as a way to get around contribution limits. Californians for a Better Government, which billed itself as, “A Coalition of Firefighters, Deputy Sheriffs, Teachers, Home Builders and Developers,” spent almost \$10 million on independent expenditures supporting California State Treasurer Phil Angelides during the 2006 election. However, more than 80 percent of the committee’s contributions came from just two individuals, Angelo Tsakopoulos and Eleni Tsakopoulos-Kounalakis, according to the California Fair Practices Commission.

If the Supreme Court strikes down the ban on direct political advocacy by corporations and unions, the decision will also serve as the basis for legal challenges to the 24 states that currently prohibit or limit corporate spending in state and local elections: Alaska, Alabama, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Wisconsin, West Virginia and Wyoming.

### **Political Spending as Percentage of Corporate Profits**

Not surprisingly, many of the biggest companies in the United States are also some of the biggest political players in Washington. Yet, even the vast amounts many of these large corporations spend are still a relatively insignificant amount compared to the resources they could potentially bring to bear. On average, the biggest Fortune 500 companies, which are also among the biggest political donors, spent less than 1 percent of their profits on lobbying and campaign contributions during the last election cycle.

**Profits Compared to Lobbying and PAC Spending  
2008 Election Cycle (millions)**

Company	Profits FY07-FY08	Political Spending		% of Profits
		Lobbying	PAC	
Exxon Mobil	\$80,110	\$45.9	\$0.7	0.06%
General Electric	\$43,037	\$39.0	\$1.6	0.09%
Bank of America Corp.	\$36,115	\$9.6	\$1.4	0.03%
Chevron	\$35,826	\$22.0	\$0.6	0.06%
J.P. Morgan Chase & Co.	\$29,809	\$10.8	\$1.1	0.04%
Pfizer	\$27,481	\$26.0	\$1.5	0.10%
Microsoft	\$26,664	\$17.9	\$1.0	0.07%
Citigroup	\$25,155	\$17.3	\$0.8	0.07%
Altria Group	\$21,808	\$28.5	\$0.9	0.13%
Goldman Sachs Group	\$21,136	\$6.1	\$0.8	0.03%

Source: Center for Responsive Politics ([www.opensecrets.org](http://www.opensecrets.org)); Fortune Magazine

In fact, if any of the largest companies, such as J.P. Morgan Chase or Exxon Mobile, chose to spend even a tiny fraction of their corporate profits during an election on direct advocacy for or against Congressional candidates, they could easily outpace total candidate spending. All of the Congressional candidates who won in the 2008 election – 435 House candidates and 35 Senate candidates – spent a combined total of \$861 million on their campaigns, or less than 1 percent of the total profits Exxon Mobile recorded during its 2007 and 2008 fiscal years.

#### **The Way Forward: Fair Elections Now**

All signs indicate the U.S. Supreme Court has a 5-4 majority in support of rolling back restrictions on corporate and union spending in their upcoming decision in *Citizens United*. Such a decision would come as no surprise for the Roberts Court, as the conservative majority has moved steadily toward deregulation of campaigns over the past two years.

While there are a few defensive legislative options for reducing the impact of a negative decision in *Citizens United* – such as requiring shareholder support for corporate political expenditures or improving disclosure laws – none of them will prevent the corrosive influence of big money in politics from getting worse. The recent direction of the Roberts Court leaves very little room to maneuver in the post-Watergate regulatory regime.

The only short-term option available to “change the game” is to create a new system of paying for political campaigns based on a blend of small donors and limited public funding that allows candidates to run highly competitive races without relying on wealthy special interests. This model is the basis for current legislation to modernize public funding for presidential elections,

under the draft **Presidential Funding Act of 2009**, and to create a new public funding system for congressional elections, under the **Fair Elections Now Act**. The path to the future should be “small-donor democracy,” not “corporate democracy.”

No matter how the Court rules, Congress must avoid the temptation to make matters worse by giving in to temptation and raising contributions limits. This is perhaps the worst of all policy options. Given that corporate executives and PACs already dominate election financing today, raising contribution limits as a response to more corporate spending in elections makes little sense whatsoever. It will only worsen the pay-to-play culture and public policy distortions created by Congress’ current dependence on large contributions – and further undermine voters’ confidence that Congress can act in the public’s best interest – without relieving Members of the crushing burden of year-round fundraising.

It is difficult to predict exactly what will happen if the Supreme Court decides to lift the ban on direct corporate and union political spending. However, it seems certain that the fear of unlimited corporate political spending will fuel a rapidly escalating fundraising arms race between candidates, the parties and outside interests. Elected officials will feel compelled to spend more and more of their time raising money, further distracting Congress from the pressing issues of the day, creating fear of political reprisal for unpopular votes, exacerbating conflicts of interest, and undermining public confidence in their government’s ability to act in the public interest.

## Fair Elections Now

### A Summary of the Fair Elections Now Act

The Fair Elections Now Act (S. 752 and H.R. 1826) was introduced in the Senate by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by Reps. John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.). The bill would allow federal candidates to choose to run for office without relying on large contributions, big money bundlers, or donations from lobbyists, and would be freed from the constant fundraising in order to focus on what people in their communities want.

#### Participating candidates seek support from their communities, not Washington, D.C.

- Candidates would raise a large number of small contributions from their communities in order to qualify for Fair Elections funding. Contributions are limited to \$100.
- To qualify, a candidate for the U.S. House of Representatives would have to collect 1,500 contributions from people in their state and raise a total of \$50,000.
- Since states vary widely in population, a U.S. Senate candidate would have to raise a set amount of small contributions amounting a total of 10% of the primary Fair Elections funding. The number of qualifying contributions is equal to 2,000 plus 500 times the number of congressional districts in their state. For example:

*A candidate running for U.S. Senate in Maine, which has two districts, would raise 3,000 qualifying contributions – the base of 2,000 donations plus an additional 500 for each of the two congressional districts.*

*A candidate running for U.S. Senate in Ohio, with 18 districts, would require 11,000 qualifying contributions before receiving Fair Elections funding.*

#### Qualified candidates would receive Fair Elections funding in the primary, and if they win, in their general election at a level to run a competitive campaign.

- Qualified House candidates receive \$900,000 in Fair Elections funding split 40% for the primary and 60% for the general.
- The formula to determine the amount of Fair Elections funding for qualified Senate candidates is as follows:
- Qualified candidates receive \$1.25 million plus another \$250,000 per congressional district in their state. The funding is split 40% for the primary and 60% for the general election.

**Qualified candidates would be also eligible to receive additional matching Fair Elections funds if they continued to raise small donations from their home state.**

- Donations of \$100 or less from in-state contributors would be matched by four dollars from the Fair Elections Fund for every dollar raised.
- The total Fair Elections Funds available is strictly limited to three times the initial allocation for the primary, and again for the general, available only to candidates who raise a significant amount of small donations from their home state.
- If a participating candidate is facing a well-financed or self-financed opponent, or is the target of an independent expenditure, they will be able to respond by utilizing this matching fund provision.

**Joint fundraising committees between candidates and parties would be prohibited.**

**Fair Elections helps offset fundraising for, and the excessive cost of, media.**

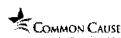
- Participating candidates receive a 20% reduction from the lowest broadcast rates
- Participating Senate candidates who win their primaries are eligible to receive \$100,000 in media vouchers per congressional district in their state. House candidates receive one \$100,000 media voucher.
- Participating candidates may also exchange their media vouchers for cash with their national political party committee.

**Participating candidates could set up leadership political action committees but would be limited to a \$100 contribution limit per individual per year.**

**The cost of Fair Elections for Senate races would be borne by a small fee on large government contractors and for House races would come from ten percent of revenues generated through the auction of unused broadcast spectrum.**

- The largest recipients of federal government contracts would pay a small percentage of the contract into the Fair Elections Fund.
- If the system proves popular like similar laws at the state level, the new system could cost between \$700 and \$850 million per year.

**The Fair Elections Now Coalition**



## **Foreign Nationals**

### **Federal Election Commission**

Published in July 2003

### **Introduction**

The ban on political contributions and expenditures by foreign nationals was first enacted in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA), an "internal security" statute. The goal of the FARA was to minimize foreign intervention in U.S. elections by establishing a series of limitations on foreign nationals. These included registration requirements for the agents of foreign principals and a general prohibition on political contributions by foreign nationals. In 1974, the prohibition was incorporated into the Federal Election Campaign Act (the FECA), giving the Federal Election Commission (FEC) jurisdiction over its enforcement and interpretation.



This brochure has been developed to help clarify the rules regarding the political activity of foreign nationals; however, it is not intended to provide an exhaustive discussion of the election law. If you have any questions after reading this, please contact the FEC in Washington, D.C., at 1-800-424-9530 or 202-694-1100. Members of the press should contact the FEC Press Office at 202-694-1220 or at the toll free number listed above.

Except where otherwise noted, all citations refer to the Act and FEC regulations. Advisory Opinions (AOs) issued by the Commission are also cited.

### **The Prohibition**

The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly. It is also unlawful to help foreign nationals violate that ban or to solicit, receive or accept contributions or donations from them. Persons who knowingly and willfully engage in these activities may be subject to fines and/or imprisonment.

**Who is a Foreign National?**

The following groups and individuals are considered “foreign nationals” and are, therefore, subject to the prohibition:

- Foreign governments;
- Foreign political parties;
- Foreign corporations;
- Foreign associations;
- Foreign partnerships;
- Individuals with foreign citizenship; and
- Immigrants who do not have a “green card.”

**Individuals: The “Green Card” Exception**

An immigrant may make a contribution if he or she has a “green card” indicating his or her lawful admittance for permanent residence in the United States.

**Domestic Subsidiaries and Foreign-Owned Corporations**

A U.S. subsidiary of a foreign corporation or a U.S. corporation that is owned by foreign nationals may be subject to the prohibition, as discussed below.

**PAC Contributions for Federal Activity**

A domestic subsidiary of a foreign corporation may not establish a federal political action committee (PAC) to make federal contributions if:

- (1) The foreign parent corporation finances the PAC’s establishment, administration, or solicitation costs; or
  - (2) Individual foreign nationals:
    - Participate in the operation of the PAC;
    - Serve as officers of the PAC;
    - Participated in the selection of persons who operate the PAC; or
    - Make decisions regarding PAC contributions or expenditure.
- 11 CFR 110.20(i).  
(See also AOs 2000-17, 1995-15, 1990-8, 1989-29, and 1989-20.)

**Corporate Contributions for Nonfederal Activity**

Additionally, a domestic subsidiary of a foreign corporation (or a domestic corporation owned by foreign nationals) may not donate funds or anything of value in connection with state or local elections if:

- (1) These activities are financed by the foreign parent or owner; or
- (2) Individual foreign nationals are involved in any way in the making of donations to nonfederal candidates and committees.<sup>1</sup>

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<sup>1</sup> This means that foreign nationals may not participate in donation activity, allocate funds for donations, or make decisions regarding donations (e.g., selecting the recipients, approving the making of donations, or approving the issuance of donation checks).

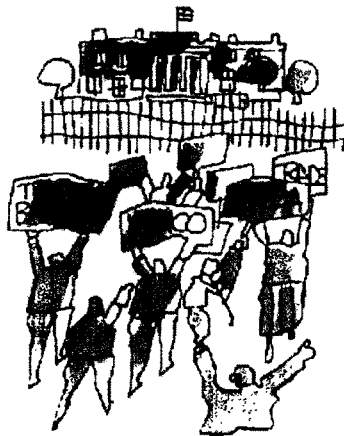


Please note that many states place additional restrictions on donations made to nonfederal candidates and committees. 11 CFR 110.20(i). (See also AOs 1992-16, 1985-3, 1982-10, and MUR 2892.)

### Volunteer Activity

Generally, an individual may volunteer personal services to a federal candidate or federal political committee without making a contribution. The Act provides this volunteer "exemption" as long as the individual performing the service is not compensated by anyone. 11 CFR 100.74. The Commission has addressed applicability of this exemption to volunteer activity by a foreign national, as explained below.

In Advisory Opinion 1987-25, the Commission allowed a foreign national student to provide uncompensated volunteer services to a Presidential campaign. By contrast, the decision in AO 1981-51 prohibited a foreign national artist from donating his services in connection with fundraising for a Senate campaign.<sup>2</sup>



### Nonelection Activity by Foreign Nationals

Despite the general prohibition on foreign national contributions and donations, foreign nationals may lawfully engage in political activity that is not connected with any election to political office at the federal, state, or local levels. The FEC has clarified such activity with respect to individuals' activities.

In Advisory Opinion 1989-32, the Commission concluded that although foreign nationals could make disbursements solely to influence ballot issues, a foreign national could not contribute to a ballot committee that had coordinated its efforts with a nonfederal candidate's re-election campaign.

In Advisory Opinion 1984-41, the Commission allowed a foreign national to underwrite the broadcast of apolitical ads that attempted to expose the alleged political bias of the media. The Commission found that these ads were not election influencing because they did not mention candidates, political offices, political parties, incumbent federal officeholders or any past or future election.<sup>3</sup>

<sup>2</sup> The Commission has stated that this opinion is not superceded by AO 1987-25. Individuals may obtain further guidance in this area by requesting an advisory opinion about their proposed activity.

<sup>3</sup> Individuals and committees should consider requesting an advisory opinion before engaging in other types of political activity involving foreign nationals.

### **Assisting Foreign National Contributions or Donations**

Under Commission regulations it is unlawful to knowingly provide substantial assistance to foreign nationals making contributions or donations in connection with any U.S. election. 11 CFR 110.20(h). "Substantial assistance" refers to active involvement in the solicitation, making, receipt or acceptance of a foreign national contribution or donation with the intent of facilitating the successful completion of the transaction. This prohibition includes, but is not limited to individuals who act as conduits or intermediaries. 67 FR 69945-6 (November 19, 2002).

### **Soliciting, Accepting, or Receiving Contributions and Donations from Foreign Nationals**

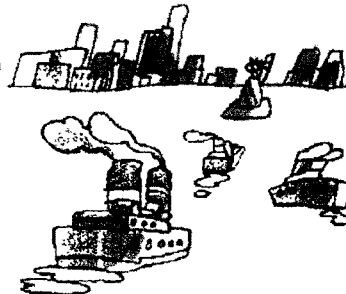
As noted earlier, the Act prohibits knowingly soliciting, accepting or receiving contributions or donations from foreign nationals. In this context, "knowingly" means that a person:

- Has actual knowledge that the funds solicited, accepted, or received are from a foreign national;
- Is aware of facts that would lead a reasonable person to believe that the funds solicited, accepted, or received are likely to be from a foreign national;
- Is aware of facts that would lead a reasonable person to inquire whether the source of the funds solicited, accepted or received is a foreign national.

11 CFR 110.20 (a)(4) (i), (ii) and (iii).

Pertinent facts that may lead to inquiry by the recipient include, but are not limited to the following: A donor or contributor uses a foreign passport, provides a foreign address, makes a contribution from a foreign bank, or resides abroad. Obtaining a copy of a current and valid U.S. passport would satisfy the duty to inquire whether the funds solicited, accepted, or received are from a foreign national.

11 CFR 110.20(a)(7).



### **Monitoring Prohibited Contributions**

When a federal political committee (a committee active in federal elections) receives a contribution it believes may be from a foreign national, it must:

- Return the contribution to the donor without depositing it; or
- Deposit the contribution and take steps to determine its legality, as described below.

Either action must be taken within 10 days of the treasurer's receipt.

11 CFR 103.3 (b)(1).

If the committee decides to deposit the contribution, the treasurer must make sure that the funds are not spent because they may have to be refunded. Additionally, he or she must maintain a written record explaining why the contribution may be prohibited.<sup>4</sup> 11 CFR 103.3 (b)(4) and (5). The legality of the contribution must be confirmed within 30 days of the treasurer's receipt, or the committee must issue a refund.<sup>5</sup>

If the committee deposits a contribution that appears to be legal, but later discovers that the deposited contribution is from a foreign national, it must refund the contribution within 30 days of making the discovery. If a committee lacks sufficient funds to make a refund when a prohibited contribution is discovered, it must use the next funds it receives. 11 CFR 103.3 (b) (1) and (2).

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<sup>4</sup> This information must be included when the receipt of the contribution is reported.

<sup>5</sup> For example, evidence of legality includes a written statement from the contributor explaining why the contribution is legal (e.g. donor has a green card), or an oral explanation that is recorded in memorandum.

## NATIONAL AFFAIRS

### The Myth of Campaign Finance Reform

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*Bradley A. Smith*

**M**ARCH 24, 2009, MAY GO DOWN as a turning point in the history of the campaign-finance reform debate in America. On that day, in the course of oral argument before the Supreme Court in the case of *Citizens United v. Federal Election Commission*, United States deputy solicitor general Malcolm Stewart inadvertently revealed just how extreme our campaign-finance system has become.

The case addressed the question of whether federal campaign-finance law limits the right of the activist group Citizens United to distribute a hackneyed political documentary entitled *Hillary: The Movie*. The details involved an arcane provision of the law, and most observers expected a limited decision that would make little news and not much practical difference in how campaigns are run. But in the course of the argument, Justice Samuel Alito interrupted Stewart and inquired: "What's your answer to [the] point that there isn't any constitutional difference between the distribution of this movie on video [on] demand and providing access on the internet, providing DVDs, either through a commercial service or maybe in a public library, [or] providing the same thing in a book? Would the Constitution permit the restriction of all of those as well?" Stewart, an experienced litigator who had represented the government in campaign-finance cases at the Supreme Court before, responded that the provisions of McCain-Feingold could in fact be constitutionally applied to limit all those forms of speech. The law, he contended, would even require banning a book that made the same points as the Citizens United video.

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There was an audible gasp in the courtroom. Then Justice Alito spoke, it seemed, for the entire audience: “That’s pretty incredible.” By the time Stewart’s turn at the podium was over, he had told Justice Anthony Kennedy that the government could restrict the distribution of books through Amazon’s digital book reader, Kindle; responded to Justice David Souter that the government could prevent a union from hiring a writer to author a political book; and conceded to Chief Justice John Roberts that a corporate publisher could be prohibited from publishing a 500-page book if it contained even one line of candidate advocacy.

In June, the Court issued a surprising order. Rather than deciding *Citizens United*, the justices asked the parties to reargue the case, specifically to consider whether or not the Court should overrule two prior decisions on which Stewart had relied: *Austin v. Michigan Chamber of Commerce*, a 1990 case upholding a Michigan statute that prohibited any corporate spending for or against a political candidate, and *McConnell v. Federal Election Commission*, the 2003 decision that upheld the constitutionality of the 2002 McCain-Feingold law. The *Citizens United* case was reargued on September 9, and a decision is pending. But however the Court rules, the debate over campaign-finance laws appears to have suffered a shock.

To anyone following the evolution of the campaign-finance reform movement, it should have been obvious that book-banning was a straightforward implication of the McCain-Feingold law (and the long line of statutes and cases that preceded it). The century-old effort to constrict the ways our elections are funded has, from the outset, put itself at odds with our constitutional tradition. It seeks to undermine not only the protections of political expression in the First Amendment, but also the limits on government in the Constitution itself—as well as the understanding of human nature, factions and interests, and political liberty that moved the document’s framers.

By putting the point so bluntly before the Supreme Court, Malcolm Stewart may have inadvertently set off a series of events that could, in time, erode the claim to moral high ground upon which the campaign-finance reform movement has always relied. At the very least, his frankness invites us to consider the origins and consequences of that movement—and the implications of its efforts for some cherished American freedoms.

## THE MISCHIEFS OF FACTION

Concerns about the political influence of the wealthy have never been far from the surface of American political life. The effort to restrict political spending—with the twin goals of preventing corruption and promoting political equality—began in earnest in the late 19<sup>th</sup> century. But in order to understand that movement and the intense debate it spawned, it is necessary to look back even further—to the founding of the American republic.

Figuring out how to keep special interests under control was a dilemma at the core of the Constitutional Convention. James Madison's most original contribution to political thought may well be his effort, in the Federalist Papers, to demonstrate how the new Constitution would ensure that private interests could not seize control of the government and use its power for their private benefit. Federalist No. 10 in particular addressed the tendency toward, and the dangers of, a government controlled by what Madison termed "factions."

In that essay, Madison recognized that there will always be individuals and interests seeking to use the government to their own ends. His entire approach to government, after all, was based on the notion, expressed in Federalist No. 51, that government is "but the greatest of all reflections on human nature"—and that by nature, men are not angels. Because partiality, the ultimate cause of faction, was "sown into the nature of man," Madison argued in No. 10, the causes of faction could not be controlled in a free republic—at least not without "destroying the liberty that is essential to its existence." This, he quickly added, would be a cure "worse than the disease." Madison's approach to the problem was therefore not to limit the emergence of factions, but to control their ill effects and, where possible, even to harness them for good.

To achieve this end, the Constitution relied on three primary devices. One was the separation of powers within the federal government. In three of the Federalist Papers—Nos. 47, 48, and 49—Madison elaborated at length on how the separation of powers would protect liberty and, by implication, prevent "factions" (what we would call special interests) from gaining control of the government. The other two devices, federalism and the idea of enumerated powers, were to work in tandem. The creation of separate spheres of action for the various state and federal governments—and the sheer size of the republic—would make

it difficult for factions to gain control of the levers of power. “[T]he society itself will be broken into so many parts, interests, and classes of citizens,” wrote Madison in *Federalist* No. 51, “that the rights of individuals, or of the minority, will be in little danger.” Because the federal government would concern itself only with matters of “great and aggregate interests” — such as national defense, foreign policy, and regulation of commerce between the states — factions would be limited to minor squabbles of local concern, where they could do relatively little harm. The idea, then, was not to limit the freedom of factions, but to divide and limit the power of government itself so that factional interests could not dominate American politics. And the very fact of the multiplicity and diversity of factions would be a limit on the power of governing majorities.

Of course, a fourth bulwark was soon added: the Bill of Rights, and in particular the First Amendment. The First Amendment was in part a reflection of Lockean principles of natural rights. In *Cato’s Letters* — which constitutional historian Clinton Rossiter has called “the most popular, quotable, esteemed source of political ideas in the colonial period” — John Trenchard and Thomas Gordon wrote that freedom of speech was “the right of every man.” But the First Amendment guarantees of free speech, assembly, and press were not seen purely as protections against government encroachment on natural rights. Rather, as political scientist John Samples notes, the founders believed that “the liberty to speak would force government officials to be open and accountable.” During the crisis over the Alien and Sedition Acts in the early years of the new republic, Madison himself noted that the “right of freely examining public characters and measures, and of communication . . . is the only effectual guardian of every other right.” As Samples argues, these founders realized that for “knowledge to inform politics and decision making, it must be publicly available. If the government suppresses freedom of speech, it prevents such knowledge from becoming public.” Thus, freedom of speech was seen as both an individual liberty and a means of advancing the public interest.

Despite these protections, spending on political campaigns was often a source of concern in antebellum America, especially after the rapid expansion of the franchise and the rise of mass campaigns for the presidency and other offices. In 1832, the Bank of the United States spent approximately \$42,000 — the equivalent of about a million dollars

today, in inflation-adjusted terms — to try to defeat Andrew Jackson, who was seeking to revoke the bank’s charter. With the growth of industry in the aftermath of the Civil War, political spending began to rise rapidly — and corporations became an important source of campaign funding. It has been estimated that by the campaign of 1888, the national Republican Party and its state affiliates were receiving 40 to 50% of their campaign funds from corporations (which benefited from high tariffs supported by the GOP). Democrats, though usually poorer, had their own financial titans — such as banker August Belmont and later his son, August Belmont, Jr., who could be counted on for at least \$100,000 (nearly \$2 million in inflation-adjusted terms) in just about every campaign in the last half of the 19<sup>th</sup> century.

But even as money was becoming more important to campaigns, the Constitution’s limits on government power (which, in the view of the framers, would also limit the power of factions to manipulate public policy) began to fall out of favor in some important quarters. Beginning in the late 19<sup>th</sup> century, the influential Progressive movement launched a sharp critique of the founders’ notions of enumerated powers and limited government, and even federalism and the separation of powers. Progressive theorists such as Herbert Croly and Columbia University law professor Walter Hamilton railed against the constraints that the Constitution placed on government power. Hamilton argued that the Constitution was “outworn” and “hopelessly out of place.” Croly argued for the need to “overthrow” the “monarchy of the Constitution.” Eltweed Pomeroy — a New Jersey glue manufacturer who became prominent as an author and the leader of the National Direct Legislation League — argued that “representative government is a failure,” and sought ways to bypass the checks and balances of the constitutional system. In short, the Progressives’ goal was a more energetic, less restrained government, which they believed was necessary to meet the demands of a modern industrial society.

It was in this context of hostility to federalism, checks and balances, and limited government that the modern drive to restrict political speech emerged. It started not as an effort to protect our constitutional arrangements from factions that would overpower them, but rather an effort to overcome our constitutional limits on the power of government. It was also intended to overcome the loud, messy, unpredictable democratic process, so as to empower a more “elevated” vision of government.



At the 1894 New York state constitutional convention, the progressive Republican icon Elihu Root called for a prohibition on corporate political giving. “The idea,” said Root, “is to prevent...the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests against those of the public.” Root explained that he was concerned about “the giving of \$50,000 or \$100,000,” amounts equal to roughly \$1.2 or \$2.4 million today. His effort ultimately failed to change the laws in New York—but it did effectively launch the modern movement to limit campaign contributions and speech.

#### THE PARTY OF SELF-INTEREST

At the same time that Root’s speech gave rise to a movement, it also pointed to one of that movement’s fundamental weaknesses. Legal historian Allison Hayward of George Mason University Law School argues that Root’s real objective was less to secure passage of his proposal than to score partisan points against the Democrats (whose leaders were then being grilled for accepting bribes from the Sugar Trust). Thus, the movement was born less from noble ideals of good government than from ignoble motives of partisan gain.

This has remained a fundamental dilemma for the “reform” movement, as the century-old effort to restrict and regulate campaign spending has come to be known. If the problem is that venal legislators are betraying the public trust in exchange for campaign contributions, why would we expect them not to be equally motivated by base impulses when passing campaign-finance legislation? Wouldn’t the ability to control political speech empower the faction that wields it, rather than constraining the power of all factions? A review of the evidence suggests this concern is well founded.

After Republican William McKinley won the presidential election of 1896 with corporate support organized by the legendary political strategist Mark Hanna, the Democratic-controlled legislatures of Missouri, Tennessee, and Florida (three states that had voted for McKinley’s opponent, William Jennings Bryan), as well as the legislature in Bryan’s home state of Nebraska, passed bills prohibiting corporate spending and contributions in state races. Even if one accepts that the authors of

these state bans were sincere in their belief that limiting the speech of McKinley and his allies was in the public interest, it is still easy to recognize the danger of regulators' mistaking their partisan advantage for the public good.

The first federal law in this arena, passed in 1907, was also a ban on corporate contributions to campaigns. The law was dubbed the Tillman Act, after its sponsor, South Carolina senator "Pitchfork Ben" Tillman. Tillman wrote and said little of his motives for sponsoring the ban on corporate contributions, but he hated President Theodore Roosevelt and appears to have wanted to embarrass the president (who had relied heavily on corporate funding in his 1904 election campaign). Tillman's racial politics also clearly contributed to his interest in controlling corporate spending: Many corporations opposed the racial segregation that was at the core of Tillman's political agenda. Corporations did not want to pay for two sets of rail cars, double up on restrooms and fountains, or build separate entrances for customers of different races. They also wanted to take advantage of inexpensive black labor, while Tillman sought to keep blacks out of the work force (except as indebted farm laborers).

Corporations supported Republicans, and Tillman—a Democrat, like most post-war Southern whites—often bragged of his role in perpetrating voter fraud and intimidation in the presidential election of 1876 in order to overthrow South Carolina's Republican reconstruction government. It is clear, then, that Tillman was no "good government" reformer; and far from being born of lofty ideals, federal campaign-finance regulations were, from their inception, tied to questionable efforts to gain partisan advantage.

Within a few years of the Tillman Act, in 1911, came "publication" laws requiring disclosure of campaign contributors and limits on campaign expenditures. These were followed by the Federal Corrupt Practices Act of 1925, aimed at tightening the Tillman Act's limits on corporate donations. In 1943, the Smith-Connally Act prohibited contributions to candidates by labor unions. In 1947, Congress extended the ban on corporate and union contributions to cover "expenditures" made directly to vendors in behalf of campaigns, rather than contributed to candidates or parties.

While these laws influenced the way in which groups and individuals participated in politics, they did little to stem the overall flow of money into campaigns, due to weak enforcement mechanisms and various

loopholes that could readily be exploited. The Federal Election Campaign Act, passed in 1972 and substantially amended in 1974, sought to address these problems by creating the most comprehensive set of regulations in history and an independent agency, the Federal Election Commission, to enforce the law.

The FECA maintained the ban on corporate and union contributions and expenditures, instituted a detailed system of reporting on contributions and expenditures, and placed limits on contributions and expenditures by individuals, including any expenditure “relative to” a federal candidate. Individual contributions to candidates were limited to \$1,000 (a limit that has since been raised to \$2,400), and contributions to Political Action Committees were capped at \$5,000. PACs, in turn, were limited to contributing \$5,000 to candidates. The law also limited total giving in an election cycle (no person may give more than \$115,500 over two years to candidates and PACs combined), and placed a host of limits on the sizes of various other contributions.

The Supreme Court pulled back some of these limits in the 1976 case *Buckley v. Valeo*, holding that FECA’s limits on expenditures made independently of a candidate violated the First Amendment. The decision further confined regulation so that it covered only expenditures that “expressly advocated” the election or defeat of a candidate, using specific words such as “vote for” or “vote against.” This allowed for heavy spending on “issue ads” that might criticize or praise a candidate but stop short of expressly urging a vote one way or the other.

The 2002 McCain-Feingold law attempted to cut off this spending, which became known as “soft money.” Among its many provisions, McCain-Feingold prohibited political parties from accepting any unregulated contributions, and prohibited corporate or union spending on any cable, broadcast, or satellite communication that mentioned a candidate within 30 days of a primary or 60 days of a general election. The law applied to non-profit membership corporations, such as the Sierra Club or the National Rifle Association, as well as to for-profit corporations. This is the law that Citizens United is alleged to have violated.

Even this account understates the complexity of the law. In an amicus brief filed in the Citizens United case, eight former FEC commissioners note that the FEC has now promulgated regulations for 33 specific types of political speech, and for 71 different types of “speakers.” The statute and accompanying FEC regulations total more than 800 pages; the

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FEC has published more than 1,200 pages in the *Federal Register* explaining its decisions; and it has issued more than 1,700 advisory opinions since its creation in 1976.

Considered in detail, each step in the effort to limit campaign spending turns out to advantage the party that sought it. If its own numbers are insufficient to pass the legislation (as was the case with McCain-Feingold in 2002), then it seeks to broaden its base by adding incumbent-protection sweeteners to attract enough members of the opposing party to create a bipartisan majority. John Samples notes that McCain-Feingold drew most of its support from Democrats—who, he argues, saw long-term electoral disaster in the growing Republican fundraising edge, which was increasing after Republicans won the presidency in 2000. But to gain a legislative majority, the minority Democrats had to gain Republican votes; Samples finds that the Republicans who supported McCain-Feingold were, by and large, those most in danger of losing their seats. For them, the incumbent-benefit protections of the law made it irresistible.

Samples makes the Madisonian observation that “politicians use political power to further their own goals rather than the public interest. . . . Campaign finance laws might be, in other words, a form of corruption.” Noting that “scholars date the largest decline in congressional electoral competition from 1970” and that the Federal Election Campaign Act—the foundation of modern campaign-finance law—was passed in 1972, Samples points out that “the decline in electoral competition and the new era of campaign finance regulation are virtually conterminous.”

This is no accident. Since the passage of the FECA, the average incumbent spending advantage over challengers in U.S. House races has soared from approximately 1.5-to-1 to nearly 4-to-1. Incumbents begin each cycle with higher name recognition and a database of past contributors, making it easier to raise more money through small contributions from more people. They also typically make the decision to run earlier than challengers do—since a challenger often waits to see if the incumbent will run before making his choice—so they have more time to raise small contributions. And because campaign-finance regulations essentially require that candidates fill their coffers in small increments, the law clearly advantages the incumbents who passed it.

The effect of campaign-finance regulations has therefore been to help the people who passed them and to strengthen special interests, rather

than to cleanse American politics of the influence of self-interested factions. Even the well-meaning reformers, it appears, have failed at their stated goals.

#### A FAILURE IN PRACTICE

Campaign-finance reform has not managed either to promote political equality or prevent corruption. And data show that one reason campaign-finance regulations are of little value in attacking corruption is that contributions simply don't corrupt politicians. In a 2003 article in the *Journal of Economic Perspectives*, three MIT scholars—Stephen Ansolabehere, James Snyder, Jr., and John de Figueiredo—surveyed nearly 40 peer-reviewed studies published between 1976 and 2002. “[I]n three out of four instances,” they found, “campaign contributions had no statistically significant effects on legislation or had the ‘wrong’ sign—suggesting that more contributions lead to less support.” Given the difficulty of publishing “non-results” in academic journals, the authors suggested in another paper, “the true incidence of papers written showing campaign contributions influence votes is even smaller.” Ansolabehere and his colleagues then performed their own detailed study, which also found that “legislators’ votes depend almost entirely on their own beliefs and the preferences of their voters and their party,” and that “contributions have no detectable effects on legislative behavior.”

Truly corrupt legislators will, after all, be lured by the prospect of personal financial benefits, not merely holding office (since most legislators, at least at the congressional level, could make more money doing other things). Those on the recent who's-who list of corrupt politicians were all brought down by their love of money: Louisiana Democratic congressman William Jefferson was caught with \$90,000 in bribe money stashed in his freezer; Ohio's Bob Ney enjoyed an all-expenses-paid golf outing in Scotland on the dime of disgraced lobbyist Jack Abramoff, and accepted thousands of dollars in gambling chips from a foreign businessman; California's Duke Cunningham solicited bribes and bought, among other things, a yacht; and Illinois governor Rod Blagojevich sought lucrative positions on corporate boards for himself and his wife. These politicians were corrupted by money and gifts given directly to them, not by funds provided to pay for pamphlets and ads.

Most legislators run for office because they have strong political beliefs, and they are surrounded most of their days by aides and

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constituents with similarly strong beliefs. On reflection, far from being counterintuitive, it seems only logical that legislators would not want to betray their political principles—or those of the electorate—for a campaign contribution. After all, votes—not dollars—are what ultimately get put into ballot boxes. And it would make little sense to anger one's constituents for a contribution that can only be used to try to win those constituents back.

By insisting that campaign contributions corrupt members of Congress and the legislative process despite the repeated failure of dozens of systematic studies to find any evidence of such corruption, reform advocates ask us to set aside important speech rights without proving the need for doing so. Their assumption that the sheer scope of campaign spending somehow proves that our system is corrupted simply has no basis in evidence—and fails entirely to keep political spending in perspective. Total political spending in the U.S. in 2008—for state, local, and federal races—amounted to approximately \$4.5 billion. By comparison, the nation's largest single commercial advertiser, Procter & Gamble, spent about \$5 billion on advertising in the same year.

The second widely stated goal of “reform” is to promote political equality. Reformers argue that some people and organizations have more money to spend on political activity than others do, and that it is unfair to allow this discrepancy to give the wealthy a major advantage. But inequality is not unique to money: Some people have more time to devote to political activity, while others gain political influence because they have a special flair for organizing, speaking, or writing. It is not clear how political equality is enhanced when a Harvard law student can spend his summer volunteering on a campaign while a small-business owner must spend his working.

In the political arena, money is a means by which those who lack talents or other resources with direct political value are able to participate in politics beyond voting. It thus increases the number of people who are able to exert some form of political influence. Limitations on monetary contributions therefore elevate those with more free time—such as retirees and students—over those (like most working people) who have less time, but more money. Such regulation also favors people skilled in political advertising over those skilled in growing corn or building homes; it favors skilled writers over skilled plumbers; it favors those, such as athletes and entertainers, whose celebrity gives them a public

megaphone over people like stockbrokers and investors, who lack a public platform for their views. And this is before we arrive at the influence of media and other elites. Under the rules established by the “reform” regime, editorial-page editors, columnists, and talk-show hosts may endorse candidates—but others may not pay to take out an ad of equal size or length to explicitly endorse their candidates.

Easing the restrictions on campaign contributions would not constrain any of these other forms of political support. Rather, allowing more contributions simply permits more people to participate in the system—thus diffusing influence, rather than concentrating it. Campaign-finance reform, then, actually *undermines* the effort to promote equal access to the political arena.

Campaign-finance reform hasn’t succeeded in achieving various secondary goals often attributed to it, either. For example, the McCain-Feingold law included the “Stand by Your Ad” provision, which now requires candidates for federal office to state in each ad: “I’m So-and-So, and I approved this message.” The idea was that forcing candidates to take direct responsibility for what they say would reduce negative advertising. Of course, it’s worth questioning whether negative advertising *should* be reduced: As Bruce Felknor, the former head of the Fair Political Practices Committee, observed as far back as the 1970s, “without attention-grabbing, cogent, memorable negative campaigning almost no challenger can hope to win unless the incumbent has been found guilty of a heinous crime.” But even leaving this question aside, the provision has failed miserably to curb negative campaigning. In 2008, for example, researchers at the University of Wisconsin found that more than 60% of Barack Obama’s ads, and more than 70% of ads for John McCain—that great crusader for restoring integrity to our politics—were negative. Meanwhile, the required statement takes up almost 10% of every costly 30-second ad—reducing a candidate’s ability to say anything of substance to voters.

Some also argue that reform will reduce the amount of time elected officials must spend fundraising, thus allowing them to devote more time to their official responsibilities. It turns out, though, that the campaign-finance regulations themselves are the primary reason for the extensive time spent fundraising. Raising large amounts of money in small contributions is much more time-consuming than raising fewer large contributions.

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Given these circumstances, it is almost impossible to argue that campaign-finance reform has improved government. *Governing* magazine—in connection with the (pro-campaign finance reform) Pew Charitable Trusts—regularly ranks state governments on the quality of their management. In both of *Governing*'s last two studies, in 2005 and 2008, Utah and Virginia were ranked the best-governed states in the nation. Utah and Virginia also tied for first place in the first *Governing* survey, from 1999, and Utah ranked first in the second study in 2001. What do these two states have in common? Among other things, they appear on the short list of states that have no limits on campaign spending and contributions. Meanwhile, states such as Arizona and Maine—which have enacted full taxpayer financing of their state races—score unimpressive marks. In terms of management, *Governing* ranked Arizona in the middle of the pack, tied for 14<sup>th</sup> with 17 other states. Maine was ranked next to last—ahead of only New Hampshire. This alone does not prove an inverse relationship between campaign-finance laws and good governance, of course, but it does help to show the absence of a direct relationship. At the very least, campaign-finance restrictions do not seem to improve government.

As campaign-finance reform has failed to achieve its goals, it has also exacted serious costs. Studies have shown that political spending helps voters to learn about candidates, to locate them on the ideological spectrum, and to be better informed about issues and contests. Reducing the amount that may be spent, and constraining the ways it may be used, can thus hurt the quality of political discourse. More important, the laws involve serious restrictions on the exercise of fundamental rights.

#### RESTRICTING RIGHTS

For years, advocates of campaign-finance regulation have worked to establish a reputation as plucky underdogs: the nation's moral conscience, fighting the good fight against powerful special interests. They did this even as the leading reform groups spent some \$200 million in the 1990s and early in this decade to pass the McCain-Feingold bill. In addition to liberal donors like the Pew Charitable Trusts, the Carnegie Foundation, and the Joyce Foundation, the groups' financial backers included several large corporations and firms, among them Bear Stearns, Philip Morris, and Enron. Yet somehow the reformers successfully branded their opponents as the purveyors and defenders of



a corrupt system, bent on protecting it for personal gain. This gambit won the reformers some moral authority, which they wielded to great effect — making deep inroads with Congress, the press, and the public.

This is why the unexpected turn in the oral argument of the *Citizens United* case caused such a stir (and such concern among campaign-finance-reform advocates). Americans, like most free people, react with visceral disgust to the notion of banning books. It is seen as a fundamental violation of the freedom of speech and the open exchange of ideas. To equate campaign-finance reform with book-banning is to threaten the moral high ground of the case for campaign-finance limits. Ceding that high ground would be very costly for reformers, since their efforts have produced so little in the way of demonstrable results.

But there is simply no question that restricting the freedoms guaranteed in the Bill of Rights — no less than side-stepping the limits on government power established by the Constitution itself — is inseparable from the movement's goals. Restrictions on campaign contributions and spending affect core First Amendment freedoms of speech, press, and assembly. While the Supreme Court has quite correctly never held that "money is speech," it has recognized, equally correctly, that limiting political spending serves to limit speech (by restricting citizens' ability to deliver their political messages). In fact, only one of the 19 Supreme Court justices to serve in the past 30 years — John Paul Stevens — has ever argued that political campaign and expenditure limits should not be treated as First Amendment concerns. Those who doubt that basic constitutional rights are at stake should imagine how they would react if the Supreme Court were to interpret the free exercise clause as allowing the faithful to hold their religious beliefs, but not to spend money to rent a church hall, purchase hymnals, or engage in church missions. Presumably, the move would be seen as much more than a mere regulation of property.

These limits on expression do not affect only wealthy donors or prominent candidates. On the contrary: Groups without a broad base of support are the ones that rely most heavily on large donors to make their voices heard. Almost by definition, political minorities, newcomers, and outcasts will find it harder to reach enough people to raise the money they need through many small contributions. Their base of support is simply too narrow. One can analogize the process to that of raising capital in financial markets: If no investor could put more than \$5,000

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into a company, large-scale IPOs would become a thing of the past. Established companies might be able to raise large amounts of capital from tens of thousands of small investors, but capital-intensive start-ups would be doomed.

So it is with political entrepreneurs, who would get nowhere without large donors. In the 1990s, for example, large-scale spending by Ross Perot gave voice to millions of Americans who were concerned that the major parties were failing to address the national deficit. Perot's spending did not "drown out" ordinary citizens, but rather helped them to be heard. In 2004, early contributions from a few big donors to the Swift Boat Veterans for Truth allowed the group to get its message on the air at a time when the national media were ignoring it. Once the group's first ads were seen by the public, the organization was bombarded with hundreds of thousands of small donations—and of course millions more supported or were influenced by the group's message. Similarly, large contributions by George Soros to MoveOn.org gave the organization the ability to contact millions of Americans and develop one of the most phenomenal grassroots political machines in American history.

Not surprisingly, it is often upon the most authentically grassroots candidacies and campaigns that the burden of regulation weighs heaviest. For example, in 2006, a group of neighbors in the unincorporated community of Parker North, Colorado, joined together to fight annexation into the neighboring city of Parker. Because they printed yard signs, made copies of a flyer, and formed an e-mail discussion group, they were charged with operating as an unregistered political committee. Three years later, their case remains entangled in the courts. And when Mac Warren ran for Congress in Texas in 2000, he spent just \$40,000 on his campaign—roughly half of it his own money. All of his campaign materials contained the name and address of his campaign committee. But two pieces of literature failed to contain the required notice that the literature was paid for by the committee—and for that omission, Warren's long-shot campaign was fined \$1,000 by the Federal Election Commission.

#### WORSE THAN THE DISEASE

As Madison understood, some people will always try to use government for their private aims. But with the Madisonian restraints on government rent-seeking largely discarded, campaign-finance regulation

becomes a futile and misguided effort—one that, as Madison argued, is not only bound to fail, but also bound to make matters worse.

A classic example is the Tillman Act and its ban on corporate contributions. The law was easily evaded, it turns out, by having corporations make “expenditures” independently of campaigns, or by having executives make personal contributions reimbursed by their companies. And when the Tillman Act was extended to include unions in 1947, unions and corporations formed the first political action committees to collect contributions from members, shareholders, and managers to use for political purposes.

Later, when the Federal Election Campaign Act imposed dramatic contribution limits, parties and donors discovered “soft money”—unregulated contributions that could not be used directly for candidate advocacy, but could be used for “party-building” activities. Such party-building activities soon came to include “issue ads”—thinly veiled attacks on the opposition, or praise for one’s own candidates—that stopped just short of urging people to vote for or against a candidate (instead typically ending with “Call Congressman John Doe, and tell him to support a better minimum wage for America’s workers”). When the McCain-Feingold bill banned soft money, the parties—especially the Democrats—effectively farmed out many of their traditional functions to activist groups such as ACORN and MoveOn. When McCain-Feingold sought to restrain interest-group “issue ads” by prohibiting ads that mention a candidate from appearing within 60 days of an election, groups responded by running ads just outside the 60-day window. The National Rifle Association responded by launching its own satellite radio station to take advantage of the law’s exception for broadcasters. Citizens United began to make movies.

Preventing this type of “circumvention” of the law has been a fixation of the “reform community” from the outset. Yet each effort has led to laws more restrictive of basic rights, more convoluted, and more detached from Madison’s insights. Each effort also appears to be self-defeating, since the circumvention argument knows no bounds. As Madison would have appreciated, every time we close off one avenue of political participation, politically active Americans will turn to the next most effective legal means of carrying on their activity. That next most effective means will then become the loophole that must be closed.

This is how the Citizens United case found its way to the Supreme Court. When the case was reargued in September, solicitor general Elena

Kagan—taking poor Malcolm Stewart’s place at the podium—assured the Court that the government had never taken action against a book, and presumably never would. But in fact, after the election of 2004, the Federal Election Commission had conducted a two-year investigation of George Soros for failing to report as campaign expenditures the costs of distributing an anti-Bush book. The agency ultimately voted not to prosecute, but its authority to do so was never in question. And Kagan did not back away from the government’s position that it had the authority to ban books should they, at some point, become a problem.

As the Supreme Court ponders whether campaign-finance restrictions assault Americans’ First Amendment rights, academic champions of such “reform” efforts are laying the groundwork for yet more regulation. Legal scholars such as Harvard’s Mark Tushnet, Ohio State’s Ned Foley, and Loyola Law School’s Richard Hasen—publisher of the “Election Law Blog”—have all argued that true reform will require open censorship of the press in order to assure political equality. Yale law professor Owen Fiss has argued that “we may sometimes find it necessary to ‘restrict the speech of some elements of our society in order to enhance the relative voice of others,’ and that unless the [Supreme] Court allows, and sometimes even requires the state to do so, we as a people will never truly be free.”

Until *Citizens United*, such Orwellian newspeak was largely buried in obscure academic journals. Malcolm Stewart’s sin was to state openly the implications of campaign-finance reform—and, in doing so, to strip away the veneer of “good government” and moral authority so carefully cultivated by reform advocates (and so important to their power). As a result, Stewart might have launched the beginning of the end for America’s failed experiment to limit factions by destroying the liberty that allows for them in the first place. When the Supreme Court decides the case, it will have the opportunity to reassert the wisdom of Madison’s deep insight into human nature—and to protect those liberties that, while they may make factions possible, also define the republic designed to contain them.